# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, ~~1958~~ 1959 / 1960

No. ~~188~~ 56 /

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JUNIUS IRVING SCALES, PETITIONER,

*vs.*

UNITED STATES OF AMERICA.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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PETITION FOR CERTIORARI FILED NOVEMBER 3, 1958
CERTIORARI GRANTED DECEMBER 15, 1958

IND. TO APPENDIX FOR

DEFENDANT-APPELLANT


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APPENDIX TO THE BRIEF OF DEFENDANT APPELLANT

# United States Court of Appeals

## FOR THE FOURTH CIRCUIT

No. 7637

JUNIUS IRVING SCALES, APPELLANT,

*versus*

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
(Bryan, J.)

THE DEFENDANT-APPELLANT, JUNIUS IRVING SCALES, PRINTS WITH HIS BRIEF, PURSUANT TO RULES, THE FOLLOWING PORTIONS OF THE RECORD.

# INDICTMENT

## IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

| | |
|---|---|
| UNITED STATES OF AMERICA | CRIMINAL NO. |
| *vs.* | U. S. C., Title 18, Section 2385—Membership in an organization which teaches and advocates the overthrow of the Government by force and violence. |
| JUNIUS IRVING SCALES | |

## INDICTMENT

(Filed November 18, 1954)

THE GRAND JURY CHARGES:

(1) That during the entire period from in or about January, 1946, and continuously thereafter, up to and including the date of the filing of this indictment, the Communist Party of the United States of America has at all times been a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit;

(2) That from in or about January, 1946, and continuously thereafter, up to and including the date of the filing of this indictment, in the Middle District of North Carolina and elsewhere, Junius Irving Scales, the defendant herein, has been a member of said Communist Party of the United States of America, the defendant well knowing during all of said period that said Communist Party of the United States of America was and is a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit, and said defendant intending to bring about such overthrow by force and violence as speedily as circumstances would permit.

In violation of Section 2385, Title 18, United States Code.

A True Bill,
/s/ W. R. Graham, Foreman

/s/ Edwin M. Stanley
United States Attorney

# EXTRACTS FROM TRANSCRIPT OF RECORD BEFORE HONORABLE ALBERT V. BRYAN

(Page numbering referred to follows typewritten transcript.)

* * *

(429)

**John Lautner**, witness for the Government, being first duly sworn, testified:

DIRECT EXAMINATION BY MR. KEENEY

Q. Mr. Lautner, again I ask you for a yes or no answer. During the time you were a member of the Communist Party were you taught what party members should do in order to achieve this goal of the Party, this ultimate goal of the Party?

A. In, during my membership in the Communist Party, on all levels, the Party's membership were always urged to carry out their obligations, their day-to-day activities, their assignments in the day-to-day work of the Party in order to bring closer to realization of the final aims of the Party.

* * *

(690)

**Barbara Hartle**, witness for the Government, being first duly sworn, testified:

DIRECT EXAMINATION BY MR. WOERHEIDE

Q. This is a preliminary question, Your Honor.

Do you recall propaganda put out by the Communist Party during the Korean War period about the waging of germ warfare by American soldiers in Korea?

A. Yes, I do.

Q. What was that propaganda?

A. The propaganda was that the American armed forces are using bacteriological warfare in Korea.

Q. Do you recall any propaganda regarding bombing raids against civilian populations?

A. Yes.

Q. What was that propaganda?

A. It was the propaganda that the Air Force was not trying to hit the military targets, but was trying to dis-
(691)
seminate the population of North Korea.

Q. What means, if you know, Mrs. Hartle, were used by the Communist Party during the war to disseminate this type of propaganda?

A. A number of means were used. Articles appeared in the Communist Party press, The People's World, the Daily Worker, Political Affairs, and other periodicals, in magazines, and were circulated, leaflets were issued by the Communist Party containing such points, and those points, speeches were made at meetings held by the Communist Party, where those things were said, those things were said in conferences by Communists and in trade union and mass organizations by Communists.

Q. In this connection did the Communist Party organize any letter-writing campaigns?

A. Yes. In that connection letter-writing campaigns were organized to the President of the United States, the State Department, and to Senators and Representatives of the United States Congress among others.

Q. Were members of the Communist Party told what to say in these letters?

A. Yes. On many occasions the postcards were printed by the Party Office or Section leadership in, on a mimeographed, so that only a signature was necessary in order to send it in. The political line of the Party to oppose the
(692)
Korean War contained the points that should be hammered home and brought home in opposing the war.

* * *

EXTRACTS FROM RECORD

(853)

CROSS EXAMINATION BY MR. TAYLOR

Q. Now, Mrs. Hartle, have you now described to your best recollection the various activities that you engaged in while a member of the Communist Party up to 1950 before going underground?

A. Well, those are some of the activities that I can recall without—at the moment; yes.

Q. Well, I will ask you this, you have testified to leaflets, periodicals, mass meetings, conferences on issues, letter writing campaigns, picnics, celebrations, picket lines, demonstrations, social affairs, Party classes and Party schools, fund-raising, recruiting, organization, having resolutions passed by trade unions, and other organizations, political campaigns, mass and front organizations, making
(854)
public speeches, sending delegations to legislatures, street meetings, organizing the Progressive Party—can you think of anything, any other type of activities that you engaged in?

A. Well—

Q. Or does that pretty well cover it?

A. Well, there were the building of organizations, I think is not covered under most—and front working in them, the building of organizations like the Labor Youth League, and the National Negro Labor Council.

Q. Yes.

A. That is not covered, and the building of an Underground apparatus was not mentioned there.

* * *

Q. I was meaning to exclude that from the testimony. I will come to that in a minute—up to the point when the Underground was started and was planned. We have now
(855)
covered the main activities that you have engaged in?

A. I think I should in all fairness state that during that time one of the activities of the Communist Party was recruiting.

Q. I mentioned that.

A. As a general activity in the concentration industries and in general.

Q. Yes.

A. Inasmuch as quite a lot of action and work has to go into recruiting into the Party.

Q. Yes. Mrs. Hartle, I included that in my question, and now I want to ask you this, are these the activities that you engaged in while you were being what you described on direct examination as a professional revolutionary?

A. Yes.

Q. By the way, were you told by your Party superiors that you were professional revolutionary, or did you come to that conclusion independently?

A. I was told that by my Party superior.

* * *

(860)

Q. Now, Mrs. Hartle, did you have any other purposes of your own in agreeing to go into the Underground?

A. Yes.

Q. Was one of those purposes that you were tired of Communist Party activities and welcomed the chance to get away from them?

A. Yes.

* * *

(866)

Q. Well, Mrs. Hartle, I'd like to read you another paragraph from your testimony before the Un-American Activities Committee given at the same time, also June 14, and beginning on the same page, 6058, immediately following where I stopped reading the preceding passage, your testimony continues:

Then when I was underground I had time to myself

(867)

and I took the opportunity to resume reading of literary classics which I was very interested in throughout my life, and I found that by reading that kind of material again my mind became more settled

down and I began to feel better, my health got better, I also started doing sewing and crocheting and things that I had no time for in the Communist Party, and I began to enjoy having a life somewhat ordered and with some semblance of peace about it.

A. Well, that doesn't refer to Tacoma. That refers to my life in the Underground.

Q. Well, you—that is generally accurate about your life in the Undeground then?

A. Well, it is more so as I got further away from Seattle and was able to operate more openly and live a more normal life, but it is not true of Tacoma.

* * *

**Ralph C. Clontz, Jr.**, witness for the Government, being first duly sworn, testified:
(1132)

DIRECT EXAMINATION BY MR. GAVIN

Q. Mr. Clontz, I hand you what has been marked for identification as Government's Exhibit 62, and ask if you know what that pamphlet is?

A. That is a publication called, a newspaper, by the defendant, The Textile Workers' Voice.

* * *

(1133)

Q. Will you turn, please, to the third page and read the article entitled The Atlantic Pact.

(No answer.)

* * *

(1134)

THE COURT: Well, look at this one and see if it is similar to or unlike the one that was handed to you, if that is a fact.
(1135)

* * *

THE WITNESS: If I may examine it, I think I can.

Yes, I have had one precisely like this one from the defendant.

BY MR. GAVIN:

Q. Will you read that article, please, sir?

A. This is an article on—

Q. Just one moment, Mr. Clontz. You said that is issued by the Communist Party of North Carolina?

A. That was at that time issued by the Communist Party, North Carolina.

Q. All right, sir.

A. This is an article titled The Atlantic Pact.

"The United States and eleven other countries have signed a treaty called The Atlantic Pact. Truman, Acheson, and the big-money newspapers are making a lot of noise about it and claiming the treaty will preserve peace and 'protect' the world from Soviet Russia. But what does this treaty really mean? It means that the Truman Government plans to use American money and guns and some day American soldiers to hold down the working people of the whole world. If the working class wins an election in France,

(1136)

or Italy, they will say Russia did it and start shooting. If the working people in any country that signed the treaty go on a strike for a decent living, they will say Russia did it.

"Our Wall Street Government will send money and guns to the big bosses of other countries to put down the working people. This treaty is the twin brother of the Taft-Hartley Act but worse. T-H uses police, soldiers and courts against American workers. The Atlantic Pact wants to use atom bombs against the workers of the whole world. They try to cover it up by saying the Soviet Union wants war. This can't be true because they have no capitalists who can profit from a war, as in our country.

"Everyone knows workers don't want to fight and die. The Russians lost fifteen million people in World War II. About four times as many people as live in all North Carolina. They have a lot of peaceful

building to do. They want peace and trade with the whole world. They don't have any unemployment and don't need a war to give people jobs. Their wages are going up and their prices are going down, and they want it to stay that way.

(1137)

"Most of the people of Europe feel the same way. They won't fight for Wall Street: They want peace, jobs and a decent living. Don't let the newspapers fool you. Honest working people including Communists want peace. It is the Wall Street crooks that want war.

"Write to Senators Hoey and Graham in Washington and tell them to vote this war pact down."

MR. SMITH: If Your Honor please, the defendant would move to strike as irrelevant to any issues in this case, as prejudicial—

THE COURT: How is that relevant, Mr. Gavin?

MR. GAVIN: If Your Honor please, if it is published by the Communist Party of North Carolina of which the defendant is Chairman, the witness says that he has seen this, this exact—maybe not this one—but one exactly like it; it is directly linked to the defendant and it carries with it what we call his language which incites to action. It is urging action either now or in the future. "Write to your Senators." It expresses the desire of the Communist Party, and we think the language itself is inciting to action.

* * *

(1138)

BY MR. GAVIN:

Q. Now, Mr. Clontz, I hand you what has been marked as Government's Exhibit No. 63 for identification, and ask if you will explain to the Court and the jury what that is, sir.

A. This is the May, 1950, issue of The Textile Workers' Voice. This is the identical document that I received from the defendant, Scales, through the mail on

June the 6th, 1950. This was addressed to me, Ralph C. Clontz, Jr., 2304 Irwin Road, City, and was mailed in Durham, North Carolina.

Q. Now, Mr. Clontz, I will ask you to read the article, Peace is the Crying Need, in that publication.
(1139)

MR. SMITH: If Your Honor please, I will object on the same ground. I think he has established its competency, that is, he is connected with the defendant, but I don't believe it's relevant to any issue in this case.

THE COURT: Have you read it?

MR. SMITH: I just looked at it, and if the Court would perhaps—

MR. GAVIN: Be glad to submit it to the Court.

THE COURT: Suppose I look at it. I cannot tell until I read it.

(The document was handed to the Court.)

(Counsel approached the bench.)

(At the Bench)

THE COURT: Now, Mr. Gavin, you suggest that this exhibit marked GX-63 should be submitted and you say why?

MR. GAVIN: Because in view of the—

THE COURT: Let the witness stand down.

MR. TAYLOR: Thank you.

(The witness stepped down.)

MR. GAVIN: If Your Honor please, the witness, Hartle, has previously testified that the Korean War was in effect or going on about the, '50 to '51, '2, and '3, and the Party at that time took a great interest; that was one of their projects, disseminating information about the war,

(1140)

urging everyone at that time, if you recall, to protest the war, to write and to wire to the President and to senators and the congressmen to do everything possible through handing out literature, to bring a halt to that war, and we say that is language within the meaning of the Yates decision either of inciting to action, which these pamphlets—first, Government's Exhibit No. 62, I believe, is it not, sir—yes, sir; carries the same type language.

You will note at the close of the article which the witness read there is this statement, "Don't let the newspapers fool you. Honest working people including Communists want peace. It is the Wall Street crooks that want war. Write to Senators Hoey and Graham in Washington and tell them to vote this war pact down."

Now this is during the cold war, immediately prior to the Korean War. This article was published in April of '49, and at that time we were building up to the cold war.

We say that that is language that tends to incite and urges action likewise. Government Exhibit 63 is in the same language.

MR. SMITH: Well, of course, it's not incitement. It's not language calculated to get people to do anything except write to their senators, which is their perfectly legal right to do and I call the Court's attention to the fact that Government's Exhibit 63, dated May, 1950, and I believe

(1141)

the Court took judicial notice that the Korean War did not start until June, 19-, June 5, 1950.

MR. TAYLOR: If I might add just one thing, Your Honor. It seems to me clear that what the Yates decision means is it must be incitement to action directed to the violent overthrow of the Government, and this is in no sense that. Under Mr. Gavin's theory, incitement to action of any kind by any organization; might come within the purview of the Smith Act.

Political parties all over the place urge people to write to congressmen. Must be action calculated to incite to the violent overthrow of the Government. This cannot possibly come in that category.

THE COURT: Well, it means that, of course, but would not other language of the stirring nature, even though legal in itself, if it were to bring about or was directed at bringing about an unlawful result, would not that be language inciting within the meaning of the Yates case?

MR. TAYLOR: If one assumes that the language is calculated to inc e people to take illegal action directed to violent overthrow of the Government, quite another picture.

THE COURT: No, no, I did not make it clear to you. If his end or his aim is illegal, even though his language may be perfectly legal, but inciting, would not that be—

MR. TAYLOR: Inciting to what, Your Honor?
(1142)

THE COURT: Inciting to the accomplishment of his aim.

MR. TAYLOR: It seems to me it has to be calculated to incite people to take action directed toward the violent overthrow of Government, and that writing to your congressmen in opposition to government policy cannot possibly constitute that kind of incitement, even however unpopular the issue may be, as it obviously is here. Writing to a congressman to take unpopular position on an issue cannot possibly be incitement to violent overthrow.

MR. WOERHEIDE: If I may inject myself, Your Honor, I believe the Court has made it clear that it need not be incitement until illegal action of it, until the testimony of the witness has made it clear that is regarded by the Party as struggle for the purpose of steeling the Party, building it up into a monolithic, well-disciplined organization which ultimately may be in the position to seize control of the Government.

This is preparatory action, but it is action, and it is directed towards the ultimate aims of the Party.

* * *

(1147)

THE COURT: Now, will these two papers conclude your evidence on this line?

MR. WOERHEIDE: Your Honor, we have—those are actually, would be preliminary to some other documents that we have, deal directly with the Korean War situation.

Now these documents relate to the period prior to the Korean War, the so-called cold war era, but the evidence in this case shows that the Korean War was one of the action campaigns of the Party. They disseminated a great deal of propaganda in connection with that war, and we are going to show what some of the propaganda was that they did disseminate and they disseminated down here in North Carolina.

(1148)

THE COURT: Well, what I was coming to was to let you go ahead with testimony along another line, and reserve decision on this point until we did have an opportunity to consider it in a broader background of the evidence, and perhaps more pointedly on the motion, and I wondered if mechanically you can go ahead, if I do reserve judgment at this time?

MR. WOERHEIDE: Your Honor, I believe that Mr. Gavin has some other testimony that he can go into.

THE COURT: Suppose we do that then.

MR. TAYLOR: And reserve decision?

THE COURT: And reserve decision.

* * *

(1152)

BY MR. GAVIN:

Q. Now, if Your Honor please, the Government will offer in evidence Exhibits No. 64, 65 and 66, which I understand you will reserve your—

THE COURT: Suppose you let me have them after they are marked.

MR. GAVIN: They have been marked.

MR. SMITH: Let the record show that the defendant objects to the same grounds as stated in connection with Nos. 62 and 63.

THE COURT: I will defer ruling at this time.

* * *

Charles Benson Childs, witness for the Government, being first duly sworn, testified:

DIRECT EXAMINATION BY MR. GAVIN

(1689)

Q. Now, did you see the defendant, Scales, in April of 1953 at the home of George Van Camp in Winston-Salem?

A. Well, I saw him at the, George and Betsy Van Camp's home in Winston-Salem in the spring of 1953. I went there to see George and Betsy Van Camp, and while I was there, I met Junius Scales, and we had a regular Communist Party Club meeting there, and at this meeting

(1690)

there was a discussion of the, Junius mentioned that in connection with the weaknesses of the Party, he said that in order to try to overcome this, we should adopt a program formulated by the Communists, Chinese Communists, which they call the Big Five Policy or Big Fivers, and in order to become a Big Fiver, these are the things we must do; attend all meetings, write letters to jailed comrades, pay dues

promptly, sell at least five pieces of literature to five different people, and then there was a fifth one which I do not recall.

* * *

(1764)

RE-DIRECT EXAMINATION BY MR. GAVIN

Q. All right, sir.

Now, Mr. Childs, as a member of the Communist Party enrolled in that organization by the defendant, Scales, and receiving guidance and instructions from him, what activities did you take part in?

A. May I use a note on that?

Q. Yes, sir.

* * *

(1765)

THE WITNESS: This list was prepared, I prepared yesterday, sir, among the things which I had been instructed to do was by Hank Farash, I was told not to go in a Negro community because I'd been going to the Negro community as I had been previously instructed to do. He told me not to go in a Negro community because he did not want me to be exposed.

Also he told me not to call the Food Tobacco and Agricultural Union Office there because again I might be exposed as being a Communist Party member.

Another thing was in connection with the printing—

(1766)

MR. SMITH: Mr. Gavin, are these things that the defendant instructed him to do? If not, I would object.

MR. GAVIN: Does Your Honor want to hear from me on that?

THE COURT: Yes.

MR. GAVIN: Your Honor, this is the question that has been asked before, I think of all Government witnesses. What activities did you take part in while you were in the

Party. I recall that Mr. Taylor asked that question of Lautner. He asked that of Mrs. Hartle I know. She gave a long list of the activities that she was engaged in. I think under the Yates case, why, we are called upon to show activity. The question was phrased, I think, so that he might describe his activities as a member of the Party in which he was enrolled by the defendant, and receiving guidance from the defendant and instructions from him.

Now it is—

THE COURT: Under the directions of someone in the Party having authority to direct; is that your position?

MR. GAVIN: Yes, sir.

THE COURT: And as I understand it, the witness said (1767)
these activities that he now is enumerating—

MR. GAVIN: Yes, sir.

THE COURT:—were pursued under the instruction and/or under the direction of Farash.

MR. GAVIN: That is correct.

THE COURT: Who was the organizer?

MR. GAVIN: Yes, sir.

THE COURT: I think that is admissible.

MR. GAVIN: And the defendant was the Chairman at that time.

BY MR. GAVIN:

Q. All right, sir, go ahead.

A. Warren Williams, who was with the City Committee of the Communist Party in Winston-Salem, told me to get the ingredients to make some mimeographing because Underground Party has to be able to make all types of things for itself. I was instructed to get the number of persons employed on day and night shifts at the Western Electric Plant.

It was suggested or discussed that I make plans for a collapsible mimeograph machine. It was told, I was told to send letters to Senators, or a Senator and the President calling for leniency for the Rosenbergs, and in connection with these letters I was to use a false name. I should try to get the editor of a newspaper to ask for a visa to Russia.

I was to try to get students legislature to pass an
(1768)
anti-McCarth, resolution. Contacted in Durham, told me to make an analysis of the Irwin Mills stockholders' report for the Textile Workers' Voice—I was also instructed to do research and write about the Wilmington riot.

I was told to get, by Hank, to get him a copy of our union contract. I was told not to sign a Clyde Brown petition. I was told to join a church where some people in my shop belonged in order to become closely associated with the people in the plant. I was told to struggle for Negro employment in Western Electric because they had to build a fire under some union representatives in that plant.

I was told to go to Camp Unity to meet more Progressives there. I was told to get an apartment to store literature and mimeograph machines for the Party in Winston-Salem. I was told to participate in the Martinsville Seven Vigil in Richmond. I attended the Washington Peace Crusade meeting in Washington.

I helped write and distribute leaflets in High Point, Winston-Salem and Durham and Chapel Hill. I helped organize, I worked with the union in Winston-Salem, the FTA union, and I helped write and publish the students Youth Bulletin, and there's many other things which I was told to do, sir.

Q. You stated that you were instructed to write your Senators and Congressmen, I believe. There may have been others. I don't recall it. I wish you would state it, if so, but
(1769)
you were to seek for, seek leniency for the Rosenbergs. Now who were the Rosenbergs?

A. The Rosenbergs were convicted for, I understand, giving atomic bomb secrets to the Russian Government. It was explained to me at this particular activity, that is, write letters, trying to get leniency for the Rosenbergs; we were told that we do not necessarily want the Rosenbergs freed, we just want them commited to a life sentence, because some day we will be able to free them.

* * *

(1791)

MR. TAYLOR: Your Honor, the defense will now move for a judgment of acquittal pursuant to Rule 29, Federal Rules of Criminal Procedure. * * *

(1794)

THE COURT: Gentlemen, the Court will deny the motion for a judgment of acquittal.

Ruling upon the motions to strike, the Court sustains the motion and rejects the exhibits designated as the Government's Exhibit 62 and 63, that is, the Textile Workers Voice of April, 1949, and another issue, circular entitled Textile Workers Voice of May, 1950. It will also strike Government's Exhibits 118, 119, which were offered yesterday.

The motion will be denied as to the other exhibits and they will be received in evidence. That is Government's Exhibits 64, 65 and 66. I think that disposes of everything that the Court had under advisement.

* * *

(1807)

MR. GAVIN: Your Honor please, from Exhibit No. 64, Government's Exhibit No. 64, which was identified by the

(1808)

witness, Clontz, and has been offered in evidence, I would like to read a portion from an article beginning on page 2, entitled The Danger of World War and the Fight For Peace,

by James Ford. This pamphlet, exhibit, Government's Exhibit No. 64 is entitled Our Party.

"We are not just faced with the imperialist drive toward war, nor merely armed aggressions against other nations. We are in a situation where U. S. imperialism is waging undeclared war against the North Korean people's government. It is a criminal reactionary slave-driver's war.

"The immediate world policies of the U. S. and its imperialism, in colonal sphere being what it is, that is to wage colonial war to express the national liberations, struggles of colonial peoples, and to enslave them, the North Korean people's republic was forced to wage a just war for national liberation and the independence of the country.

"The U. S. A. launched the war on North Korea through mobilizing the United Nations behind the adventure. It dominates the U.N. and has its sanction to put down with armed force the struggles of colonial peoples for self-determination and national independence anywhere in the world. And because of this the

(1809)

U.S. war on North Korea is frought with serious danger to world peace.

"The North Korean people's armies upset U.S. imperialism's timetable for world war. Defending national independence, it is making a profound impression in Asia. Since the Second World War the colonial peoples and in the first place China, have demonstrated tremendous fighting capacities for their national independence, have inflicted a mortal wound on imperialist colonialism and held up U.S. imperialism drive to world war, but U.S. imperialists are trying to undo all of this. They are waging war against the Korean people, threatening armed invasion of China, supplying arms against Indo-China, Malaya, and so forth, and they are instigating provocations in the Pnilippines, Puerto Rico and other Latin American

countries, all of which is aimed at world domination and even more ruthless imperialist colonialism than heretofore."

* * *

I would like to read a marked portion [from Government's Exhibit No. 65] on page number 5; the title of the (1810)
article is Who Is Preventing Termination of the War In Korea?

The most urgent and burning issue of the day is to end the war in Korea. So persistent is the demand for all countries to extinguish the flames of war lighted and fanned in the Far East by the American imperialists that even the ruling politicians of the capitalist world for all their cringing servility to America are forced to reckon with it. Hence, the importance attached by public opinion to the discussion of the Korean question in the Political Committee of the General Assembly.

The discussion was started by a faked-up charge leveled by Washington against the Communist people's republic and by an attempt to have it declared aggressor, but subsequent developments took quite a different turn from what Truman and Acheson had expected. The American political leaders are opposing as peace lovers and are vociferously claiming that their one desire is attainment of peace, but the truth is that they do not want the cessation of the Korean War because all of their plans and projects and all their practical measures are aimed at extending the area
(1811)
of aggression in the Far East.

If Your Honor please, I am going to ask Mr. Woerheide if he will read from the Exhibit No. 66.

MR. WOERHEIDE: This exhibit was introduced by the witness, Clontz, who testified that he received it from the defendant, Junius Scales. The cover bears the title I Saw the Truth in Korea. On page 3 the heading is What I Saw in Korea. The date line is September, 1950, and I begin reading at the bottom of page 4.

EXTRACTS FROM RECORD

"Going down to Taejon in South Korea, I kept hearing a report that a large number of 'political prisoners' had been slaughtered near there. That is a larger number than were murdered in the towns between Seoul and that city. Some said three thousand, some said four thousand.

"As is often the case in Korea, the facts were worse than the rumor for at that time most Koreans were not acclimatized to the diabolical ruthlessness of the Americans and their puppets. Try to imagine Rangwul Valley, about five miles southeast of Taejon on the Yongdong Road. Hills rise sharply from a level floor about one hundred yards across and a quarter of a mile long. In the middle you can walk safely, though your shoes may roll on American cartridge

(1812)

cases, but at the side you must be careful for the rest of the valley is a thin crust of earth covering corpses of more than seven thousand men and women.

"One of the party with me stepped through nearly to his hip in rotting human tissue. Every few feet there is a fissure in the topsoil through which you can see into a gradual sinking mass of flesh and bone. The smell is something tangible that seeps into your throat. For days after I could taste the smell. All along the great death pit, waxy dead hands and feet, knees, elbows, twisted faces and heads burst open by bullets, stick through the soil.

"When I read of Nazi murder camps at Belsen and Buchenwald I tried to imagine what they were like. Now I know I failed.

"All six of the death pits are six feet deep and from six to twelve feet wide. The biggest is two hundred yards long, two are one hundred yards long and the smallest thirty yards long. Local peasants were forced at the rifle point to dig them, and it was from these that I got the facts.

"On July 4, 5 and 6, all prisoners from the jails and concentration camps around Taejon were taken
(1813)
in trucks to the valley—after first being bound with wire, knocked unconscious and packed like sardines on top of each other. So truck loads were driven to the valley, shot and flung into the pits. Peasants were made to cover the filled sections of the pits with soil.

"For the next ten days prisoners from other places were concentrated in the emptied jails and the peasants went on digging. On July 16, the people's army smashed the American Kum River defense line and at dawn on July 17 the slaughter of the remaining prisoners began.

"On this day, thirty-seven truck loads of at least one hundred each were killed—over three thousand seven hundred, including numerous women.

"American officers, with officers of the puppet army, went in jeeps on each day and supervised the butchery. Every witness agrees on this, and I asked several separately to show me where the jeeps and the Americans stood. There were emptied packets of American cigarettes lying around. All of the thousand cartridge cases on the ground were made in America. I picked up a handful of M-1 carbine cartridge cases
(1814)
which I have still. Every one was fired at a Korean, Korean patriot.

"This was only one of the massacres carried out at American instructions. * * *"

(1827)

MR. GAVIN: Now, Your Honor, these exhibits have been accepted by the Court. We would like for the jury to be allowed to examine them, and at such time so that it will not interfere with the progress of the trials. There are other exhibits including all of them I would say that we wish—

THE COURT: Well, could not it be handled in this way? The exhibits will, of course, be sent to the jury at the proper time and they can make such inspection of them as they want.
(1828)

MR. GAVIN: That will be all right, sir.

* * *

MR. TAYLOR: The second motion is for a mistrial based on the admission and the reading from the Exhibits 64, 65 and 66. Those exhibits were admitted over our
(1829)
objection. The objection made on the ground that they were unrelated to any issue in the case, and were remote and prejudicial. We believe that the reading of the extracts from these exhibits to the jury was calculated to inflame passions of the jury and deny the defendant an opportunity of a fair trial, and on that basis we move for a mistrial.

* * *

(1831)

MR. WOERHEIDE: Well, there is considerable testimony, Your Honor, with respect to activities by the Communist Party not only in North Carolina, but all over the United States with respect to the Korean War, and there is considerable testimony regarding the activity of the defendant, Scales, in this connection.

MR. TAYLOR: Your Honor, there is nothing in the Smith Act, nothing in the indictment about the Korean War. That is why we say it doesn't relate to the issues of the case.

THE COURT: The motion for a mistrial will be denied.

I think the Court should caution the jury in respect to the exhibit that was read. Let the jury come in.

* * *

(1832)

THE COURT: Ladies and gentlemen, just before the recess was taken, there was read to you extracts from certain

of the exhibits in the form of pamphlets which had been admitted into evidence. I want to say to you that you should receive that evidence without any feeling, simply passively and impartially, and do not become excited or incited or inflamed by any such testimony. It is not admitted for the truth of it or for the falsity of it. It is simply admitted for
(1833)
the fact that it was published.

So I do not want you to be aroused by it or let it in any way influence your judgment or distort your ability to pass upon this case perfectly impartially as between the Government and the defendant. I want you to guard against weighing the evidence, except in the cold objective fashion, and dismiss any incitement or any feeling that may have been aroused in you, and just remember that it is simply admitted for its being the printed word, not for the truth or falsity of its contents. I am sure that you will not allow it in any way to take any other position in your mind.

* * *

(2178)

MR. GAVIN (Concluding Argument For Government)

I want you to look at Government's Exhibit No. 66, I Saw the Truth in Korea, and see the kind of propaganda they spread in this country as worthy of belief, and see whether or not there is language in that exhibit that would incite you to action.

* * *

(2181)

* * * In 1948, I believe it was, he told the witness, Clontz, that he knew that thousands of Communists were going to be arrested under the Smith Act, and he said something to Clontz, he wanted a lawyer to represent him.

He knew that he was heading for trouble. He knew that it was against the law to advocate the overthrow of the Government of the United States through force and
(2182)
violence, and yet he persisted in it, right on up here until

the time he was brought back here to Greensboro. He was underground for three years; where he was, we don't know. What he did, we don't know. Who he contacted, how many converts he brought into communism, we don't know.

* * *

## MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT OF ACQUITTAL—THE PROOF OF COMMUNIST PARTY ADVOCACY IN THE LIGHT OF THE YATES CASE

filed 2-18-58

In *Yates v. United States,* 354 US 298, the Supreme Court ruled (at p. 329) that the proof in that case was insufficient to establish that the Communist Party of the United States advocated forcible overthrow of the government "in the sense of a call to forcible action at some future time." It therefore becomes pertinent to compare the proof in the present case with that in the *Yates* case, in order to determine whether the prosecution has added anything of sufficient significance to satisfy the rule, laid down in the *Yates* case (at p. 329), that that Smith Act does not prescribe "advocacy of the abstract doctrine of forcible overthrow," but only advocacy to that end of an action-inciting type.

In the preparation of this memorandum, the defense has not had access to the complete record of the *Yates* case. It is believed however, that the government briefs in the Supreme Court of the United States, and in the Court of Appeals for the 9th circuit, contain a sufficient selection of the *Yates* evidence for the disposition of this motion. Examination of those briefs discloses that *every important item of proof presented in this case was also before the Supreme Court* in the *Yates* case, and that nothing has been presented here to support a conclusion different from

that reached by the Supreme Court. There has been a complete failure of proof of action-inciting advocacy on the part of the Communist Party during the statutory period (1951 to 1954) and the period covered by the indictment (1946 to 1954).

## I. STRANDS OF PROOF

The defense has surveyed the evidence offered by the prosecution in this case, and has observed some 50 different "strands of proof" relating to the Communist Party. Obviously, such a selection cannot be incontrovertibly precise. Some strands are so closely connected as to be virtually inseparable, and a different eye might see a few more or less than are listed herein. But the showing is sufficiently clear for present purposes, and most of the strands are readily distinguishable. We have listed them below according to four general categories, according to geography and time. References to the government's *Yates* brief in the Supreme Court are cited as "S," and in the Court of Appeals as "C".

### A. Basic Tenets of Communist Doctrine and Practice, Applicable in All Capitalist Countries.

1. Communist Party as the vanguard of the working class (Hartle, Lautner, Clontz). See S 158; C 164-65.

2. Dictatorship of the proletariat (Lautner, Hartle). See S 147 and 152 *et seq.*; C 54-55.

3. Marxist-Leninist doctrine as the basis of Communist Party theory and practice (Lautner, Hartle, Clontz). See S 146-50; C 54 *et seq.*

4. Proletarian internationalism as the bond between the working class of all nations (Lautner). See C 31.

5. Just and unjust wars (Lautner, Hartle). See C 36-41, 157, 187.

6. Communist "strategy" and "tactics" (Lautner, Hartle, Clontz). See S 159-60; C 27 and 166-67.

7. Imperialism as the last stage of capitalism (Lautner, Hartle). See S 154; C 156-57.

8. "Objective" and "Subjective" conditions necessary for successful revolution (Lautner, Hartle). See C 188-89.

9. Democratic centralism as a principle of Communist Party organization (Lautner). See S 164 and 168; C 54 and 99.

10. Dismissal or expulsion of Communist Party dissenters (Lautner). See S 169; C 103-14.

11. Impossibility of peaceful transition from capitalism to socialism; inevitability of force and violence (Lautner, Hartle, Clontz). See S 151-57 and 162; C *passim*.

12. Communist Party functionaries as "professional revolutionaries" (Lautner, Hartle). See C 57 and 165.

13. "Class struggle" as constant conflict between capitalists and working class (Lautner, Hartle). See S 151; C 150-52.

14. "Opportunism" as betrayal of the working class (Hartle). See S 158.

15. "Contradictions" of capitalism (Hartle). See C 151.

16. Revolution vs. "reformism" (Hartle, Clontz). See S 160; C 167-68.

17. "Monolithic" Communist Party (Lautner, Hartle). See S 164; C 165.

18. Surplus labor value theory (Hartle). This doctrine does not appear in either S or C.

19. The State as an instrument of oppression (Hartle). See S 151; C 152-53.

20. The Paris Commune as an early example of proletarian revolution (Hartle). See S 143; C 14-20 and 200-02.

21. Democracy as an avenue to revolution rather than a value in itself (Hartle). See S 152; C 131 and 192.

22. Working class to turn against own imperialist government and change an imperialist war into a civil war (Hartle). See C 26-27; 46-47 and 187.

23. Party dictatorship of the personal life of Communist Party members (Hartle). Does not appear in this form in S or C.

24. The "Cadre" (Duran). See C 33, 165.

25. Use of press and publications to educate the workers for socialism (Clontz). See C 85-98.

26. Exploiting social and political issues for Communist Party purposes (Hartle, Duran). See C 132-34, 213 and 234 *et seq.*

27. Infiltration of trade unions (Reavis, Hartle). See C 152.

B. Basic Tenets of Communist Doctrine Particular to or of Special Importance in the United States.

1. The "Negro nation" in the "black belt" with the right of "self determination" (Lautner, Hartle, Reavis, Cummings, Jones, Clontz and Childs). The prosecution in this case has seen fit to introduce far more evidence on this theme than in the *Yates* case or other Smith Act cases. But the essential idea appears clearly at C 157-58.

2. Concentration in basic industries (Lautner, Hartle). See S 174-77; C 54 and 134-41.

3. No United States "exceptionalism" (Lautner, Hartle). See S 153 and 163; C 12, 156 and 177-78.

4. Russian revolution of 1917 as guide for Communist plans and tactics in United States (Lautner, Hartle). See S 164; C 168-72.

5. Necessity of nation-wide re-education of Communist Party members after 1945 to stamp out "revisionism" and return to basic principles of Marxism-Leninism (Lautner, Hartle). See S 147-49; C 142-47.

6. Fallacy of "left wing sectarianism" (Hartle). See S 169.

C. Recent or Current Declarations, Policies, and Practices of Communist Party, of General Application Throughout the World.

1. Duclos letter and reaffirmation of Marxism-Leninism (Lautner, Hartle). See S 145; C 50.

2. The "United Front" (Hartle). See C 42-53 and 167.

3. Support of the Stockholm Peace Pledge (Hartle). See C 45.

4. Non-intervention in China and support of Chinese Communists (Hartle). This policy does not appear to be mentioned in the *Yates* briefs, but of course it is well known as a general policy of the Communist Party throughout the world.

5. Opposition to Allied intervention in Korea (Hartle). See C 45 and 242.

6. Opposition to the Tito government in Yugoslavia (Hartle). This policy does not appear in the *Yates* briefs, but is a well known feature of Communist foreign policy.

D. Recent or Current Declarations, Policies, and Practices of the Communist Party, of Special Importance in the United States.

1. Putting an end to Browder "revisionism" (Lautner, Hartle). See S 146; C 150.

2. Reduction in the size of the Communist Party units as a security measure (Lautner, Hartle, Clontz). See S 173; C 58.

3. The "underground" as a means of secret Communist Party operation (Lautner, Hartle, Clontz). See S 171; C 114-20.

4. Efforts to evade Taft-Hartley non-Communist oath requirements (Lautner, Hartle). This item does not appear in the *Yates* briefs.

5. Organization of the Communist Party Underground in "triangles" or "three's" (Lautner, Hartle). See S 171-72; C 121-23.

6. Underground use of radios, small mimeograph machines, etc. (Lautner, Hartle). See S 172-74; C 123-24.

7. Possible assistance of Red Army in time of revolution (Hartle, Clontz). This item does not appear to be mentioned in the *Yates* briefs.

8. The "independent" and the "mass" role of the Communist Party (Hartle). This item is not described in these words in the *Yates* briefs, but is implicit in the discussion of the Communist Party tactics.

9. A third party in the United States and support of the Progressive and A L P parties (Hartle, Clontz). This item does not appear in the *Yates* briefs.

10. "Infiltration" of mass organizations (Hartle, Clontz, Reavis, Duran). See C 236.

## II. DOCUMENTARY EVIDENCE

The documentary proof offered to show the unlawful advocacy of the Communist Party differs in no significant respect from that produced in the *Yates* case. Here again, the defense has not had access to a complete list of the *Yates* exhibits. Likewise, there has apparently been a different selection of Communist periodical literature specifically from the monthly *Political Affairs*. Nevertheless, the similarity of basic documentary proof is striking, as is shown in the following table:

MEMORANDUM

| Title | Yates Gov't. Ex. | Scales Gov't. Ex. |
|---|---|---|
| Communist Manifesto | 39 | 2 |
| Program Communist International | 59 | 3 |
| Stalin, Foundations of Leninism | 1 | 5 |
| Stalin, Problems of Leninism | 146 | 6 |
| Lenin, What is to be Done | 266 | 7 |
| Lenin, Imperialism, the Highest Stage of Capitalism | 23 | 8 |
| Lenin, Left Wing Communism | 503 | 9 |
| Lenin, Paris Commune | 492 | 12 |
| Strategy and Tactics | 147 | 13 |
| Dictatorship of the Proletariat | 149 | 14 |
| Lenin, State and Revolution | 11 | 16 |
| Lenin, Kautsky The Renegade | 504 | 18 |
| History of the CPSU | 28 | 19 |
| The Communist—January, 1940 | 12 | 20 |
| The Struggle Against Revisionism | 650 | 23 |
| Political Affairs, September 1945 | 55 | 24 |
| Outline on Fundamentals of Marxism | 93 | 25 |
| Political Affairs, September 1946 | 2 | 26 |
| Study Course on the Communist Party | 175 | 29 |
| Political Affairs, June 1950 | 411 | 36 |
| Lenin, War and the Second International | 490 | 117 |

Government exhibits 17, 21, 22, 27, 30, 31, 38, 39 and 55 do not appear in the small selection of exhibits listed in Volume II of the Appendix to the Government's brief in the Court of Appeals, nor have we found them mentioned in the briefs. Whether or not any of these were introduced in evidence in the *Yates* case is unknown to us. However that may be, it is apparent that all of the basic Communist classics, and the principal recent pamphlets and outlines, relied on by the prosecution in the present case, were also before the Supreme Court in the *Yates* case. These included substantially all of the writings from which "revolutionary" extracts were read by the prosecution to the jury in the present case.

Respectfully submitted this 18th day of February, 1958.

Attorneys for the Defendant

s/ Telford Taylor

s/ McNeill Smith

## DEFENDANT'S PROPOSED INSTRUCTIONS

### DEFENDANT'S PROPOSED INSTRUCTION NO. 1

The defendant admits that he was a member of the Communist Party during the period from 1946 to 1954 specified in the indictment. Therefore, the two charges against the defendant which remain for your decision are:

(1) Did the defendant, during the period from November 18, 1951, to November 18, 1954, know the Communist Party to be a group or society that advocates the overthrow and destruction of the United States Government by force and violence as speedily as circumstances permit; and

(2) Did the defendant during that same period personally intend to overthrow and destroy the United States Government by force and violence as speedily as circumstances would permit.

### DEFENDANT'S PROPOSED INSTRUCTION NO. 4

It is not a crime under the Smith Act for any person to incite or stir up other persons to take illegal or violent action if such action is not intended or reasonably calculated to lead toward the overthrow of the Government by force and violence.

### DEFENDANT'S PROPOSED INSTRUCTION NO. 5

It is not charged in the indictment that the Communist Party is an organization that seeks to accomplish the violent overthrow of the Government by any means whatsoever.

It is charged that the Communist Party is an organization that teaches or *advocates* the overthrow of the Government by force and violence. Therefore, even if you should

be persuaded that the Communist Party seeks to accomplish the overthrow and destruction of the Government by force and violence, you cannot find the defendant guilty, unless you find that the Communist Party advocates or teaches such violent overthrow, and that the defendant knew that the Communist Party so advocates.

## DEFENDANT'S PROPOSED INSTRUCTION NO. 6

In considering whether the Communist Party advocates the violent overthrow of the Government by language intended and reasonably calculated to incite persons to forcible action directed to that end, you should consider with the other evidence the official declarations and pronouncements of the Communist Party in its constitution, resolutions, and public statements of its leaders. You cannot find that the Communist Party engaged in unlawful advocacy merely because a particular group or groups within the Communist Party has engaged in such advocacy, unless you find that the unlawful advocacy of members within the party has been so extensive in time and place that it must be considered the advocacy of the Communist Party itself.

## DEFENDANT'S PROPOSED INSTRUCTION NO. 7

If you find that the Communist Party has requested, encouraged, or incited its members or other persons to take action, you must then consider whether such action was intended and reasonably calculated to [redacted] accomplish the overthrow of the Government by force and violence. Such action does not mean or include activities that every citizen has the right to engage in under the Constitution and laws of the United States. Specifically, it does not include making speeches, publishing magazines, books, and leaflets, writing letters to newspapers and public officials, mass meetings, picketing and other recognized forms of public demonstration, or other means of public persuasion, unless those means are used to advocate the violent and forcible overthrow of the Government. You cannot find the defendant

guilty if the activities incited by the Communist Party include only such means of public persuasion as are used to voice opinions on public issues of foreign and domestic policy, no matter how unpopular or odious to the majority of American citizens those opinions may be.

DEFENDANT'S PROPOSED INSTRUCTION NO. 8

In considering the charge that the defendant knew the Communist Party to be an organization or society that advocates the overthrow of the Government by force and violence, you cannot find him guilty merely because you find that he knew that such advocacy is contained in certain books, writings, and statements of the Communist Party. You cannot find him guilty unless you determine that he knew that the Communist Party advocates the overthrow of the Government by force and violence, and so advocates by means of language reasonably and ordinarily calculated to incite persons to action which is directed at and intended to accomplish the forcible overthrow of the Government.

DEFENDANT'S PROPOSED INSTRUCTION NO. 12

You may not use testimony as to statements made by other persons as evidence against the defendant merely because such other persons were members of the Communist Party. The law does not make a member of the Communist Party responsible for the acts or statements of any other member merely because of their common membership in that organization.

DEFENDANT'S PROPOSED INSTRUCTION NO. 13

The fact that the defendant used any book or writing in any school or class, or discussed such book or writing with some other person, or has read such book or writing cannot, standing by itself, be taken as proof that the defendant agreed with or approved any particular statement contained in such book or writing, or had knowledge of the teaching and advocacy of any other person with reference to such book or writing.

## DEFENDANT'S PROPOSED INSTRUCTION NO. 18

The words "revolution", "destruction" and "overthrow" do not of themselves imply the use of force or violence for the accomplishment of the objective which is sought. "Revolution", "destruction" or "overthrow" may be accomplished by peaceable and non-violent means.

## DEFENDANT'S PROPOSED INSTRUCTION NO. 21, AS REVISED.

Defendant, in common with all other persons living under our Constitution, has the right protected by the First Amendment to criticize the Government and its foreign and domestic policies, as well as the right to praise the foreign policy of other governments and the role being played by those governments in international affairs. Therefore, your verdict in this case must not be influenced or affected by your view as to the truth or falsity, the reasonableness or unreasonableness or the validity or invalidity of opinions on these subjects expressed by the defendant or the Communist Party.

## CHARGE TO THE JURY

THE COURT: As you know, ladies and gentlemen, the indictment here is drawn under what is called the Smith Act, and the indictment charges four things. It charges first that the Communist Party of the United States is a group teaching or advocating the overthrow and destruction of the government of the United States by force and violence, as speedily as circumstances will permit; second, that the defendant was a member of this Party; third, that while a member of the Party, he well knew of its teachings and purposes; and, fourthly, it charges that he, himself, specifically intended to bring about such overthrow of the Government of the United States, by force and violence, as speedily as circumstances would permit.

Those are the accusations of the indictment. If established, these alleged acts constitute a crime under the Smith Act.

All of those charges, each and every one of them, must be proved beyond a reasonable doubt before the defendant may be convicted. These four charges constitute the four elements of the crime of which the indictment accuses the defendant, and there is no crime if any one of them is not proved.

The defendant has entered a plea of not guilty. That is a complete denial of all of the charges, a denial absolutely of his guilt, a denial of every inference and implication of guilt.

In considering this case, I ask that you consider each of the elements of the offense separately and consider them in the order in which they are charged in the indictment. To be punishable, the criminal acts charged in the indictment must have been committed within the three-year period next preceding the finding of the indictment; that is, they must have been committed between November 18, 1951, and November 18, 1954. Unless the time is otherwise specified, the acts I have mentioned as unlawful are to be understood by you as only those occurring within this three-year period. The three-year period is fixed by the statute of limitations in the Federal Criminal Code.

Obviously, the first issue for you to decide is this: Was the Communist Party of the United States during this three-year period a group or society criminally teaching and advocating the overthrow and destruction of the United States Government by force and violence, as speedily as circumstances would permit. That is the first question for you to answer.

As you will recall, the evidence on this point consisted of certain books and treatises of Marx, Engels, Lenin and Stalin purporting to state and expound the principles and aims of Communism. The evidence included also the testimony of former members of the Party, explaining the content of these books and treatises and testifying to what they knew were the teachings of the Party. Likewise, the evidence included proof of the official declarations and pronounce-

ments of the Party and of its leaders. You should consider all of this evidence and determine whether it does, or does not, prove beyond a reasonable doubt that the Communist Party of the United States of America taught or advocated the overthrow and destruction of the Government by force and violence, as speedily as circumstances would permit.

You may consider evidence of the aims, principles and teachings of the Communist Party prior to the three-year period, that is, before November 18, 1951, in determining what were its aims, principles and teachings after November 18, 1951; but in this connection you must consider whether the aims, principles and teachings changed after November 18, 1951 or continued to be the same. But, remember, it is only the aims, principles, and teachings from November 18, '51, to November 18, '54, that are in question here.

The issue in this case is not whether you agree or disagree with the aims, objects, policies, or principles, either of the defendant or of the Communist Party. It is immaterial here whether the jury or the Court or anyone else disagrees with the policies or principles of the defendant or of the Party, or may consider them odious or despicable.

Moreover, it is the teaching or advocacy of the Party and not merely the teaching and advocacy of a certain group or groups within the Party that is to be ascertained by you.

In making your decision of this question I may be of some assistance to you by telling you what does, and what does not, constitute such a teaching or advocacy of force and violence as is criminal.

It is not criminal for any person or group to hold or express the belief that the Government of the United States should be completely changed. It is not criminal for any person or group to have such a change of government as a purpose or an aim, or to express the opinion or to predict that the Government of the United States will at some time

be overthrown by force and violence. It is not criminal to publicly advocate and urge such a change of government by peaceable and constitutional means. It is not criminal to criticize the government and its policies, foreign and domestic, or to praise the policies of a foreign government or governments. This is true regardless of whether you agree or disagree with the truth or falsity of such criticism or praise.

Nor is it criminal for the Communist Party or anyone else to teach that should a change in our form of government be made by peaceable and constitutional means, and thereafter the new government should be resisted by force and violence, then the new government would be justified in using force and violence to subdue such resistance. In other words, if the change has been made by peaceful and constitutional means, the new government would have the right to protect itself by force and violence against any other change, unless such subsequent change was to be effectuated by peaceful, constitutional means.

Moreover, you cannot convict the defendant merely because he was a member or an officer of the Communist Party, no matter what were the principles and teachings of the Party, for such membership or office alone is not a crime. Moreover, the teaching in the abstract or teaching objectively, that is, teaching, discussing, explaining, or expounding what is meant by the aim or purpose of any author, group, or society of overthrowing the Government by force and violence is not criminal. For example, study and discussion by the Communist Party or by any other group in classrooms, or in study groups, or public or private meetings with the object of informing the participants or the audience of the aims and purposes of the doctrines of Marx, Lenin, Stalin, or the Communist Party is entirely lawful. Furthermore, without being criminal, the Communist Party could privately or publicly endeavor to persuade its members that they should adopt and espouse the belief that the Government of the United States should be overthrown by force and violence as speedily as circum-

stances will permit. This is no more than advocating an idea, and advocating an idea is no crime. Moreover, without transgressing the Smith Act, the Party might even instruct its members that it would be for their good and benefit, if this belief or idea were carried into effect.

All of this is permissible because such utterances are protected by the First Amendment of the Federal Constitution, guaranteeing freedom of speech.

However, if the Party went further, and with the intention of overthrowing the Government by force and violence, it taught, or advocated a rule or principle of action which both, one, called on its members to take forcible and concrete action at some advantageous time thereafter to overthrow the Government by force and violence, and, two, expressed that call in such written or oral words as would reasonably and ordinarily be calculated to incite its members to take concrete and forcible action for such overthrow; then, if the Communist Party did that, the Party became such a society or group, as was outlawed by the Smith Act.

To be criminal the teaching or advocacy, or the call to action just described need not be for immediate action, that is, for action today, tomorrow, next month, or next year. It is criminal, nonetheless, if the action is to be at an unnamed time in the future, to be fixed by the circumstances or on signal from the Party.

It is criminal if it is a call upon the members to be ready, or to stand in readiness for action, or for a summons to action at a favorable, or opportune time in the future, or as speedily as circumstances will permit, provided always that the urging of such readiness be by words which would reasonably and ordinarily be calculated to spur a person to ready himself for, and to take action towards, the overthrow of the Government. But those to whom the advocacy or urging is addressed must be urged to do something now or in the future, rather than merely to believe in something. In other words, the advocacy must be of concrete action, and not merely a belief in abstract doctrine. However, the

immediate concrete action urged should be intended to lead towards the forcible overthrow, and be so understood by those to whom the advocacy is addressed.

Ladies and gentlemen, the inciting words or language do not have to be delivered in a speech, or an address, or harangue, or expressed in oratorical or emotional fashion. The incitment may take the form of quiet and earnest instruction in a classroom or in private discourse, but, to be criminal, the incitement must have been imparted with the intent to accomplish the overthrow of the Government by force and violence. Unless there is such intent, the activity of the Party is not criminal. However, there need not in fact be action. The Smith law punishes the call for action, even though action never comes about.

To summarize, it is not the abstract doctrine of overthrowing or destroying organized government by unlawful means which is denounced by the Smith Act, but rather the teaching and advocacy of action for the accomplishment of that purpose, by language reasonably and ordinarily calculated to incite persons to such action. Accordingly, you cannot find that the Communist Party of the United States was a society or group of persons who teach or advocate the overthrow or destruction of the Government of the United States by force and violence, unless you are satisfied beyond a reasonable doubt that the Party did in fact so teach or advocate, and did so with the intent that such teaching or advocacy be of a rule or principle of action, and by language reasonably and ordinarily calculated to incite persons to such action, all with intent to cause the overthrow or destruction of the Government of the United States by force or violence as speedily as circumstances would permit.

It is in this understanding, and in this understanding only, that you must determine whether the evidence shows beyond a reasonable doubt that the Communist Party of the United States of America was a group or society teaching and advocating the overthrow and destruction of the Government by force and violence at the propitious time.

If you are not convinced beyond a reasonable doubt that the Communist Party of the United States was such a group or society, or that it intended to overthrow the Government by force and violence, then you cannot find the defendant guilty, and you should acquit him without consideration of the remaining elements of the crime.

On the other hand, if you believe beyond a reasonable doubt that the Communist Party was such a group or society, then you should next consider whether the defendant, Scales, was an active member of, or affiliated with, the Party with knowledge of its aims and purposes. The defendant admits that he was a member of the Party. For his membership to be criminal, however, it is not sufficient that he be simply a member. It must be more than a nominal, passive, inactive, or purely technical membership. In determining whether he was an active or inactive member, consider how much of his time and efforts he devoted to the Party. To be active he must have devoted all, or a substantial part, of his time and efforts to the Party. Moreover, to be criminal, the activities of the membership and knowledge of the Party aims and purposes must have existed within the period from November 18, 1951, to November 18, 1954.

A specific intent, as I have already indicated to you, on the part of the accused to bring about the overthrow of the Government, as speedily as circumstances would permit, is also necessary and an indispensable requisite of the offense, and the intent must have existed during the three-year period.

You will readily recognize that knowledge and intent are states of mind, and they cannot be, and, hence, they need not be, proved by what you and I know as direct or eye, or autoptic evidence as it is sometimes called. Knowledge and intent can only be proved by circumstances, so in determining whether the defendant had the required knowledge and intent, you can, and you should, consider his opportunity to become aware of, or have notice of, learn

and acquire knowledge of, the aims and purposes of the Party. In this connection consider also his position, or participation in the Party, his education, his mentality, his study, his conduct, his words, his writings and all circumstances indicating knowledge or intent, or lack of knowledge or intent.

In making your determination in respect to the knowledge and intent you are not limited to the occurrences during the three-year period. For this purpose you may consider evidence of his knowledge and conduct as well as any other circumstances occurring prior to November 18, 1951. In determining the knowledge of the defendant, you can consider only those teachings and publications of the Communist Party, and statements by members of the Communist Party, which have been shown to be known to the defendant, and such teachings and publications or statements which have not been shown to be known to him cannot be considered by you in determining whether or not he is guilty under the charge.

If you have found beyond a reasonable doubt that the Communist Party of the United States was a group or society teaching or advocating the overthrow of the Government by force and violence when the time was ripe, but you are not convinced beyond a reasonable doubt that the defendant was an active member with knowledge of its purposes, or you are not convinced that he, himself, had the intent to accomplish that purpose, then you must find him not guilty, because those elements are just as indispensable to the offense as the aims and purposes of the Communist Party.

But, if you do believe beyond a reasonable doubt that the Communist Party of the United States was a society or group forbidden by the Smith Act, that the accused was an active member of the Party, that he well knew of its aims and purposes and that he, himself, intended to accomplish that purpose, then you should find him guilty as charged in the indictment.

So much, ladies and gentlemen, for the principles of law defining and establishing the alleged crime of the indictment. I will now endeavor to explain to you the principles of law governing how you are to determine whether or not the conduct and circumstances constituting this offense did in fact occur. These are well known principles of law, but they are, nevertheless, fundamental. They are binding upon every jury and every court in this land and their repetition or familiarity does not in any way lessen their importance.

The first is this: The Court charges you that whenever a person is charged with crime, he comes into court presumed to be innocent, and this presumption of innocence is an abiding one, and goes with the defendant throughout the entire case, and applies at every stage of the case until it is repelled by proof.

The burden is upon the United States to prove beyond a reasonable doubt the guilt of the defendant before he can be convicted. Mere suspicion or probability of his guilt, however strong, is not sufficient to convict. Nor is it sufficient if the greater weight or preponderance of the evidence supports the charge in the indictment. If the evidence of the acts and conduct of the defendant is just as consistent with his innocence as with his guilt, it is not sufficient to convict him. To warrant the conviction of the defendant, the evidence of his guilt must be so conclusive to exclude every reasonable hypothesis or theory of his innocence.

I can define reasonable doubt no better than to say that it is a doubt founded on your sound and reasonable judgment, after a consideration of all the evidence. A doubt that is engendered solely by sympathy, or a dislike to accept responsibility for convicting is not a reasonable doubt. The law does not require absolute certainty, nor does it require proof beyond all possibility of mistake. It does require that after weighing the entire evidence in the case, you should be satisfied to that degree of certainty that you would be willing to act on the faith of in your own

important affairs. If after a fair and dispassionate consideration of all the evidence, you reach a point where you can say upon your conscience and judgment that from the evidence you are morally certain of the guilt of the defendant, and that you cannot reconcile the evidence with any reasonable hypothesis of innocence, you will have been convinced beyond a reasonable doubt, and you should find the defendant guilty. If, however, upon weighing all the evidence, it does not satisfy your judgment and conscience to that degree of certainty that will enable you to say that you are morally certain of the guilt of the defendant, you should return a verdict of not guilty.

There is in this case, as in so many cases, the question of credibility or believability of witnesses. That is a determination solely for the jury. Neither by these instructions, nor by any ruling, nor by any words or remarks of the Court during this trial, does or did the Court intimate, or mean to give, or wish to be understood as giving, an opinion as to what the proof is or what it is not, or what the facts are in this case or what are not the facts therein. That is solely and exclusively for the jury to find and determine. However, it is the duty of the Court to point out to you certain general principles, which you should take into consideration when you consider this phase of the case.

There is, of course, no absolute guide or arbitrary measure by which the jury shall determine the truthfulness or untruthfulness of a witness. Among the things which the jury may properly consider in such determination are whether the witness has any motive or reason for being truthful or untruthful in his testimony; whether there has appeared from the attitude and conduct of the witness any bias, prejudice or feeling which may cause his testimony to be influenced thereby; whether his testimony bears the earmarks of truthfulness, or untruthfulness; and to what extent it is corroborated, or confirmed by other testimony which is not questioned, or to what extent it is corroborated or confirmed by the known or admitted facts. The jury also may consider the intelligence of the witness, and his

opportunity to have accurate knowledge of the matters to which he has testified. In other words, the jury may consider the testimony of the witnesses in connection with all the facts proven in the case and which are apparent, and from them determine the degree of credibility the jury will give to the witnesses, and the weight to be given to their testimony.

It is for you, ladies and gentlemen, to determine whether or not any witness, who testified in the capacity of an expert, has the qualifications of an expert on the matters concerning which he testified. Moreover, the opinions expressed by any such witnesses, the Court charges you, are not binding upon the jury and the jury may reject any such opinions which they find are not well founded in fact. In any event, such opinions are to receive such weight and credits as the jury may determine.

The Court charges you that the testimony of witnesses who were in the employ of the Department of Justice, or any of its agencies, must be examined with greater scrutiny and care than the testimony of an ordinary witness. This is because they are paid to investigate and obtain evidence, if any, of the crimes charged to the defendant, and the jury should consider whether such employment, or compensation, or anything incident thereto might affect their testimony.

The defendant has introduced evidence as to his previous good character. Such evidence should be considered by the jury, and given such weight as it is entitled to receive when considered in the light of all the other testimony. If a person, by his conduct, has built up a reputation for good character, it is certainly a fact which should be considered and the benefit of which should be given to him. But it is only one fact to be considered along with all other facts, and previous good character should not permit a person to escape conviction of a crime, if considering all of the facts, including the fact of previous good character, you are satisfied of his guilt beyond a reasonable doubt. The Court charges you that if the evi-

dence as to any material fact in the case is conflicting, then evidence of the good character of the accused may resolve such doubt into a reasonable doubt.

The defendant here has not taken the witness stand and testified in his own behalf. The Court charges you that the defendant was entirely within his rights in not testifying, and that such failure does not create any prejudice against him, and the jury should not permit that fact to weigh against the defendant in arriving at its verdict.

I remind you again, ladies and gentlemen, that the indictment in this case is in no sense evidence. It is simply a statement—a formal statement—of the charge or accusation made against the defendant, its purpose being simply to apprize the defendant of what the charge is against him. The fact that it was found by a grand jury does not give any weight to it as evidence.

You must decide this case entirely on the evidence as you have heard it from this witness stand, and not on any opinion not formed from this evidence. You decide it, too, within and upon the law as outlined to you by the Court in this charge.

The Court reminds you too, as you probably already know, that the statements and arguments of the attorneys do not constitute evidence in the case.

Your verdict, whether it be a verdict of not guilty or guilty, must be a unanimous verdict. It must be the verdict of each and every one of you—the verdict of all of you. no matter which way it may be.

When you retire to deliberate upon your verdict, the Court would suggest that you first select a foreman, or forewoman, to preside over your deliberations and to render your verdict when you are ready to do so. My understanding of the practice in this district is that the jury does not return a written verdict. The jury simply returns into court and the foreman, or forewoman, on the request of the clerk announces the verdict of the jury. Your verdict would

be "not guilty" or "guilty," and no more. In the event you find the defendant guilty, you do not have anything to do with the fixing of the punishment of the defendant.

The exhibits will be sent to you in your jury room.

The Court will ask the alternates to now stand aside.

Ladies and gentlemen, after the alternates leave the jury room, I will ask you to retire to the jury room, but let me say to you this, and ask you to obey it rigidly. Do not commence your deliberations or take any action until the Court sends you word to commence. Under the rules the Court has to, after charging the jury, consider any questions of law. The Rules of Federal Criminal Procedure require that to be done before the jury retired, but out of the hearing of the jury, and it cannot well be done out of the hearing of the jury unless the jury has retired. So I will ask you to retire, but not to begin your deliberations until I send you word. Will you withdraw now.

(The jury retired to the jury room at 3:52 o'clock p.m.)

## EXCEPTIONS TO CHARGE OF COURT

(2215)

MR. TAYLOR:

Thirdly, we except to the portion of the charge stating that the requirement of incitement to action is fulfilled if there is a call on members to be ready for action. We do not believe that the mere state of being in readiness is action, within the meaning of the Supreme Court's decision, that a call to do nothing except be there is in itself a call to action in any real sense, and that that is not in accordance with the Supreme Court's decision in the Yates case.

Finally, we except to the portion of the charge in respect to active membership in the Party for two reasons. In the first place, we do not believe that mere activity is an element of the offense under the Statute, nor to the

charge in the indictment. That mere fact alone, of course, would not have made the charge prejudicial to the defendant but it seems to us that the way that portion was given, it was suggested that mere activity might supply the re-
(2216)
quirement of guilty knowledge. It seemed to us to suggest that active membership in the sense of carrying on Party activities would support an implication of knowledge that the Party's purpose was to advocate violent overthrow, and in that respect we believe that the charge was prejudicial and, likewise, not necessary under the language of the Statute and under the indictment.

## SUPPLEMENTAL CHARGE

THE COURT: Ladies and gentlemen, in the course of the charge, I used the words "an organization outlawed by the Smith Act." I do not want that to in any way mislead you. I mean a society or group forbidden by the Smith Act. I used the word "outlawed" in the sense of being forbidden or prohibited by the Smith Act.

In another part of the charge the Court also told you that it would be criminal if it was a call upon the members to be ready or to stand in readiness. I do not want that to mislead you. Simply to be ready or to stand in readiness would not suffice as a call forbidden by the Smith Act. The call must be for action at some future time, at a time that is unnamed, but a time that is determined by the signal of the Party or by the circumstances, or as it is expressed, as speedily as circumstances will permit.

I simply wanted to clarify those two points in the event they might have misled you.

Now if you will retire and commence your deliberations without further waiting for word from the Court.

# JUDGMENT

Judgment and Commitment

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

*United States of America*
*v.*
*Junius Irving Scales*

No. Cr-4320-O
Title 18 USC Sec. 2385

On this 21st day of February, 1958 came the attorney for the government and the defendant appeared in person and by his counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty of the offense of Membership in an organization which teaches the overthrow of the government by force and violence, contrary to section 2385, title 18, U. S. Code as charged in the indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Six (6) years, unless sooner released by operation of law.

JUDGMENT

IT IS ADJUDGED that, upon motion of the defendant, execution of the foregoing commitment be suspended for a period of 90 days to allow the defendant to perfect an appeal to the said judgment, and thereafter until final termination of the proceedings on said appeal in all courts, if said appeal is perfected in the manner and within the time prescribed by law, the defendant being let to bail pending said appeal upon bond in the sum of $20,000.00 with approved security.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

* * *

/s/ Albert V. Bryan

Albert V. Bryan—United States District Judge.

# CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitution of the United States:

1. Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

2. Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

B. Statutes

1. 18 U. S. C. Section 2385 (the Smith Act):

Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officers of any such government; or

Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating,

advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

2. 50 U. S. C. Section 783 (the Internal Security Act of 1950):

(a) It shall be unlawful for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship, as defined in paragraph (15) of section 782 of this title, the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization, or foreign individual: *Provided, however,* That this subsection shall not apply to the proposal of a constitutional amendment.

* * *

(c) It shall be unlawful for any agent or representative of any foreign government, or any officer or member of any Communist organization as defined in paragraph (5) of section 782 of this title, knowingly to obtain or receive, or attempt to obtain or receive, directly or indirectly, from any officer or employee of

the United States or of any department or agency thereof or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, any information of a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States, unless special authorization for such communication shall first have been obtained from the head of the department, agency, or corporation having custody of or control over such information.

* * *

(f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 787 or section 788 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute.

3. 50 U. S. C. Sections 841 and 843 (the Communist Control Act of 1954):

Section 841. The congress finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through the public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large

for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchial chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed.

Section 843. (a) Whoever knowingly and willfully become or remains a member of (1) the Communist Party, or (2) any other organization having for one of its purposes, or objectives the establishment, control conduct, seizure, or overthrow of the Government of the United States, or the government of any State or political subdivision thereof, by the use of force or violence, with the knowledge of the purpose or objective of such organization shall be subject to all the

provisions and penalties of the Internal Security Act of 1950, as amended, as a member of a "Communist-action" organization.

(b) For the purposes of this section, the term "Communist Party" means the organization now known as the Communist Party of the United States of America, the Communist Party of any State or subdivision thereof, and any unit or subdivision of any such organization, whether or not any change is hereafter made in the name thereof.

4. 28 U. S. C. Section 1861 (Qualifications of jurors):

Any citizen of the United States who has attained the age of 21 years and resides within the judicial district, is competent to serve as a grand or petit juror unless:

(1) He has been convicted in a state or federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

(2) He is unable to read, write, speak and understand the English language.

(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service.

(4) He is incompetent to serve as a grand or petit juror by the law of the State in which the district court is held.*

5. 28 U. S. C. Section 1864 (Manner of drawing names of grand and petit jurors):

*Section 9.1 of the General Statutes of North Carolina states that a juror must be a person who resides in the county, who is over 21 years of age and who is "of good moral character" and has "sufficient intelligence to serve as a member of grand and petit juries." The statute excludes from any jury service all those "who have been convicted of any crime involving moral turpitude or who have been adjudged to be *non compos mentis*".

The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing.

The jury box shall from time to time be refilled by the clerk of court, or his deputy, and a jury commissioner, appointed by the court.

* * *

The jury commissioner and the clerk, or his deputy, shall alternately place one name in the jury box without reference to party affiliations, until the box shall contain at least 300 names or such larger number as the court determines.

* * *

6. Public Law 85-269; 71 Stat. 595.

Chapter 223 of title 18, United States Code, is amended by adding a new section 3500 which shall read as follows:

"§ 3500. Demand for production of statements and reports of witnesses

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

"(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

"(d) If the United States elects not to comply with an order of the court under paragraph (b) and (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretior shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement,' as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

Approved September 2, 1957.

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In the
**UNITED STATES COURT OF APPEALS**
**for the Fourth Circuit**

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No. 7637

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JUNIUS IRVING SCALES,
Appellant

*v.*

UNITED STATES OF AMERICA,
Appellee

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA (Bryan, J.)

---

## APPENDIX FOR APPELLEE

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### JOHN LAUTNER'S TESTIMONY

### DIRECT EXAMINATION

(tr. 80) * * *

Now, Mr. Lautner, were you ever a member of the Communist Party of the United States?

A Yes.

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NOTE: "(tr. ——)" is reference to the beginning of Reporter's Transcript pages. They are all set flush left for convenience, hence in some instances may be off several words.

Q During what period of time?

A From the year of 1929, up to the beginning of 1950, and with the exception of the time I was in the armed forces, I was a member of the Communist Party.

Q Did you leave the Communist Party voluntarily?

A No.

Q What were—would you briefly describe the circumstances surrounding your leaving the Party?

* * *

(tr. 81) THE WITNESS: I was accused of being a Government agent and I was forcibly expelled from the Communist Party.

BY MR. KEENEY:

Q That was in January, 1950?

A That is correct.

Q Now what, if anything, did you do after your expulsion from the Communist Party?

A Well, I was in a turmoil, mental turmoil and in a very upset condition for months because the accusation was an unjust accusation, and finally I decided in September, 1950, to get in touch with the Government about the Communist Party.

Q Excuse me. What did you do in that connection?

A I wrote a letter to the Director of the Federal Bureau of Investigation, J. Edgar Hoover, explaining to him who I was and what happened to me in the Communist Party, and I offered my unconditional cooperation to the Federal Bureau of Investigation to fight Communists.

* * *

(tr. 82) * * *

MR. KEENEY: If the Court please, I would like to read this to the jury at this time.

Government's Exhibit 1 is a letter, at the top New York City, September 14, 1950.

(tr. 83) Dear Sir:

First let me introduce myself. My name is John Lautner. I was expelled from the Communist Party U.S.A. in January, 1950. Up to that time I was New York State Chairman of the Review Commission and a member of the National Review Commission. I was expelled for being a "enemy agent of long standing". This is not a joke, and you will understand my reaction and emotional disturbance that followed for the kind of treatment I received as a loyal member of the C.P. But this is over now. I had to resolve many personal ideological problems in my thinking before I could come to this decision. I am ready and willing without any reservations on my part to give my fullest co-operation to the aims and objectives of your organization. I can be contacted at 579 Fort Washington Avenue, New York City. Telephone WA-3-9011. Respectfully yours.

And then it is signed John Lautner. There is a P.S. to the letter.

P.S. Due to some aspects of illegal activities of the C.P., in my opinion, it would pay to exercise the utmost discretion for the time being.

With the initials J. L.

(tr. 84) BY MR. KEENEY:

Q As a result of that letter, I take it, you were put in contact with the Federal Bureau of Investigation.

A Yes.

Q Mr. Lautner, in your letter there are mentioned two positions in the Communist Party; were you commission, position in New York State, and a membership in the National Review position of the Communist Party during your membership in the Party, did you hold any other positions?

A Yes.

Q Would you briefly describe to us the other position that you held in chronological order, if possible?

A All right.

In 1930, in the spring, I was sent in to a National Training School of the Communist Party. It was held in New York City. I was a student in that school, and after graduation I was sent out to Detroit, Michigan, as District Secretary of the Hungarian Bureau of the Communist Party. I functioned in that capacity, in Detroit, Michigan, and in addition to that for a short while I was also Control Commission Secretary of the Michigan District of the Communist Party.

Early in 1931 I was transferred from there to Canada.

Q Was that an assignment by the Communist Party of the United States?

(tr. 85) A That is correct. The transfer came from the Organizational Department of the Communist Party.

I functioned in Canada for about nine months. From

there I was reassigned to Cleveland, Ohio, as District Secretary of the Hungarian Bureau in Cleveland, Ohio, and also as one of the editors of the daily Communist paper in Cleveland.

From there I was reassigned in 1933 as a Section Organizer of the Communist Party in New York City. I functioned in that capacity up to April, 1936. Then I was reassigned as District Organizer or State Chairman of the Communist Party of the United States of West Virginia. I functioned in that capacity to the end of 1940.

At the beginning of 1941 I was reassigned again to the National Training School, and after graduation from that school in, at the end of April in 1941, I was assigned to the Nationality Groups Commission of the Communist Party in New York and also National Secretary of the Hungarian National Bureau of the United States. I functioned in these capacities up to November, 1942, and also in addition to that for about six months I was also assigned as National Secretary of a Sick and Death Benefits Organization known as the International Workers Order of the Hungarian Section of it, with 16,000 members.

In November of '42 I was drafted into the Army. I served in psychological warfare up until the end of May in (tr. 86) 1945, and I came back from overseas. I was discharged from the Army. I was reassigned to the Nationality Groups Commission by the Party in '45.

Q This was in New York, was it, Mr. Lautner?

A That was in New York. That's right, and also as a National Secretary of the Hungarian Bureau. In 1946 I was assigned in the reorganization of the New York Dis-

trict on an industrial basis. My specific assignment was the Building Trades Section of the Communist Party in New York. In early 1947 for awhile I was sent out to the Concentration Region of New York. That was the New York waterfront. The Chelsea Region.

Q What do you mean by Concentration Region, Mr. Lautner?

A Well, as a result of the 1945 reconstitution convention the Party laid down a three-pronged program of which concentration policy was one of the prongs.

Q Concentration in what?

A In basic industries.

Q Thank you.

A Then in May, 1947, I was appointed State Chairman of the Review Commission of the New York State Organization of the Communist Party. I functioned in that capacity up until the time I left the Communist Party at the beginning of 1950, and in addition to that in 1948 I was also appointed to the National Review Commission of the (tr. 87) Communist Party and functioned in that capacity, too, until I left the Communist Party.

Q Mr. Lautner, during the time you were a member of the Party did you attend any National Convention of the Party?

A Yes, numerous National Conventions.

Q Would you tell us which conventions you attended.

A I attended the National Convention of the Communist Party in 1936, in 1938, 1940, two conventions in 1940, in 1942, in 1945 and in 1948.

Q Now during this period of time, during the period you were in the Party, did you also attend National Committee

meetings?

A Yes. I attended National Committee meetings in the years of '36, '37, '38, '39, '40, '41, and possible a meeting in '42. I am not certain about that.

Q Mr. Lautner, while you were a member, I believe you made mention of a school. Did you attend as a member of the Communist Party, did you not?

A Well, I mentioned two schools, one in 1930 and one in 1941.

Q Now the first of these schools, when was that held?

A That, in 1930, in the spring of 1930.

Q In what type school was this?

A That was a National Training School organized by the Hungarian National Bureau of the Communist Party, composed of students from all over the country.

(tr. 88) Q Mr. Lautner—

A It lasted about three and a half months.

Q What is the Hungarian Bureau?

A The Hungarian Bureau was under supervision of the Language Department of the Communist Party, composed of leading Communists who knew the language, to give leadership and guidance, Communist leadership and guidance in that particular national group field.

Q Where was this school held, Mr. Lautner?

A This school was held in New York City and in the Party Building on Union Square, when the Party Building was on Union Square, in that particular period.

Q Why do you describe it as the Party Building?

A Because in the building there were a number of Party institutions, such as, the New York District Organization of the Party, "The Daily Worker", and other Party or-

ganizations; the National Office was not in that building. The National Office was on 125th Street at that time.

Q I don't know whether you told us how many students attended the school, Mr. Lautner?

A About twenty; my best recollection about twenty.

Q Were they all from New York?

A No, they were from all over the country.

Q Now while you were attending this school, did you pay tuition?

(tr. 89) A No.

Q Did you provide your own living quarters?

A No.

Q Did you pay your expenses?

A No.

Q Who paid them?

A The National Hungarian Bureau.

Q Do you know if that was—

A It was true of some, some of them, though, came from out of town, their respective organization that sent them in to New York paid their expenses, of some of them.

Q You know that of your own knowledge?

A. Yes.

* * *

(tr 90) * * *

Q I ask you also whether an individual by the name of Toth taught at the school?

A Yes, a person named Toth, later known to me as Louis Weinstock was also a teacher in that class.

Q Mr. Lautner, you told us that an individual by the

name of Louis Bachrach taught a course at this school. Was he a member of the Communist Party at this time?

A Yes, sir.

Q Did he hold a position?

A Yes, sir.

Q What position did he hold?

A He was editor of the Hungarian daily paper, Communist paper in New York.

Q Did he hold any position in the Communist Party as of the time you left the Party?

A At the time I left the Communist Party in 1950, he held a high position in another Communist Party.

Q Now what course did Bachrach teach?

A He taught the Communist Manifesto.

Q That is a, Communist Manifesto by—

A Karl Marx. That is correct.

Q You say that there was a Dr. John Gyetvai taught at the school?

A That's correct.

Q Did he hold any position in the Communist Party at (tr. 91) that time?

A He was one of the editors of the daily Communist paper in New York.

Q As of the time you left the Party did he hold any position in the Party?

A Yes.

Q What position?

A He was the ambassador to Turkey of the Hungarian Communist Government.

Q What course did he teach?

A Dialectical materialism and historical materialism.

Q I will ask you the same question with respect to James Lustig; what did he hold, any position in the Party at that time?

A He was another editor of that paper.

Q As of the time you left the Party, did he have a position therein?

A Yes.

Q What was it?

A He was an international representative of the United Electrical Workers Union.

Q Do you know whether or not he had any position in the Communist Party itself at that time, at the time you left?

A That was it. Well, I don't know that he was a District Organizer for a while, and then he was assigned to the (tr. 92) U.E., and he held that position for a long, long time, I think from the mid-1930's up until the time I left the Party, and he may even have it today. I don't know.

Q What course did he teach, Mr. Lautner?

A Marxism-Leninism.

Q All right. Now you say that there was a Dr. John Santo?

A He was not a doctor, John Santo.

Q Excuse me. Mr. John Santo. What position, if any, did he hold in the Communist Party at that time?

A At the time he was teaching, he was also one of the editors of this daily paper.

Q What did he teach?

A The Decisions of the Sixth World Congress of the Communist International.

Q Now Antonio Vexler was—did she hold a position in the Communist Party at that time, at the time she taught at the school?

A That's right. She had a—she was an editor of a weekly Communist magazine for women.

Q What did she teach at the school, Mr. Lautner?

A Her subject matter was the Paris Commune.

Q Did she use any publication in connection with her teaching?

A Yes, we had a booklet on the Paris Commune.

(tr. 93) Q Was that in English.

A No, that was in Hungarian.

Q Now you said that Louis Toth taught at the school. Do you recall what he taught?

A Yes. Louis Toth taught the History of the Russian Revolution and the History of the Communist International.

Q Did you know Louis Toth by any other name?

A Yes. Louis Weinstock.

Q Did he hold any position in the Communist Party at that time?

A Yes, he was Business Manager of the Hungarian daily Communist paper, and later on he became a union official.

Q As of the time you left the Party, did he hold any position therein?

A Yes.

Q What position did he hold?

A He was a member of the National Review Commission, the same commission I was a member of.

Q Mr. Lautner, you said that an individual by the name of Peters taught at this school, I believe?

A That's correct.

Q Did he hold any position in the Communist Party as of the time he taught?

A Yes.

Q What position did he hold?

(tr. 94) A He was Business Manager for the "Daily Worker" at that time.

Q Now, subsequently, in the Communist Party did you have any contact with this individual?

A Yes.

Q Do you know what, whether or not he held any subsequent positions?

A Yes.

Q What position did he hold?

A I know that he held positions in the New York District of the Communist Party as Organizational Secretary of the New York District. He held positions in the national leadership as an Organizational Specialist. He held a position at one time in the late 1930's where he was in charge of the Communist Party in Washington—in Washington, the Government apparatus. He was teaching numerous classes for the Communist Party, groups of young Communist Party members for colonization into basic industries. These were some of the positions that I know he held.

Q Mr. Lautner, what course did Mr. Peters teach at this school?

A He taught Political Economy, Marx and Political Economy.

Q Do you know whether or not this Peters ever wrote anything for publication for the Communist Party?

(tr. 95) A Yes.

Q What did he write?

A In the, around the mid-1930's he wrote a booklet. It was called a Manual on Party Organization, which dealt with fundamental principles and Party organizational principles and problems.

Q Mr. Lautner, while you were at the school you were told what the purpose of the school was?

A Yes.

Q What were you told the purpose was?

MR. TAYLOR: You could—Your Honor, could we have specifications, told by whom and when?

THE COURT: Yes.

MR. KEENEY: You were told what the purpose of the Party was? Who told you?

THE WITNESS: You mean what the purpose of the school was?

BY MR. KEENEY:

Q Purpose of the school was. I am sorry. Will you tell us who and when.

A Yes. It was after the end of the 1930 school. We had an evaluation of the school, its work, by J. Peters and Dr. John Gyetvai, and this evaluation was held in the auditorium at 350 East 81st Street in New York City, and the purpose of the school was stated in the evaluation by the (tr. 96) two mentioned persons.

Q Who were they, sir?

A J. Peters and Dr. John Gyetvai.

Q What did they say the purpose was?

A The purpose was to, first of all, to develop professional revolutionaries, and to develop capable leadership to satisfy the needs for the organizational problems confronting the Party and the Hungarian National Group field.

Q Mr. Lautner, were you told what a professional revolutionary is?

A Yes.

Q What is it, as you were told?

A A Professional revolutionary is one who dedicates his life to the aims and objectives of the Communist Party, to whom the Party needs are primary. His personal problems, if any, are secondary; who can uproot himself any time when the Party calls upon him, if necessary, to go into a factory and work, or take an assignment as an organizer where else to submit himself completely to the needs of the Communist Party; that type of a person is known as a professional revolutionary.

* * *

(tr. 97) Q When were you told what you were expected to do as professional revolutionaries?

A In the evaluation it was brought out, as I stated before, both by Dr. Gyetvai and J. Peters, and we were receiving assignments as to our future work, and we were asked to live up to the expectations of the Party's leadership and to not to disappoint those who had confidence in us in sending us to the school as students, so that they can be proud of the fact that we are carrying out the decision of the Party after graduation.

Q Mr. Lautner, at the school were you told what Marxism-Leninism is?

(tr. 98) MR. TAYLOR: I have to make the same re-

quest, Your Honor, to be specific, by whom and when he was told this.

BY MR. KEENEY:

Q Were you told first, Mr. Lautner?

A Yes.

Q When?

A Well, I was told on numerous occasions in the course of twenty years and—

Q But at this school?

A I used to tell students myself on numerous occasions.

Q Well, at the school.

A At this particular school; yes.

Q Who told you?

Q It was brought out in two different, two different subject matters. It was brought out in the subject matter of Marxism-Leninism. It was brought out in the decision of the Sixth World Congress by both Lustig and Santo, and probably others.

Q Mr. Lautner, I don't want to go into Marxism-Leninism at this point, but I want to ask you this question. Were you taught at this school concerning the applicability of Marxism-Leninism to the conditions of the United States at that time?

A Yes, sir.

/Q I will ask you this question. Did you use at any (tr. 99) time subsequent to this school, teach concerning the applicability of Marxism-Leninism to conditions in the United States?

A Yes.

Q When was that?

A Well, as late as 1947-48 when I was teaching classes of Marxism-Leninism in New York City.

Q Did you subsequently—well, let me ask you this.

You say you attended two schools, Mr. Lautner. When was the second one?

A The second one was the National in which I was a student.

Q Which you were a student?

A Yes, sir; in 1941, the National Training School.

Q Now at this 1941 Training, National Training School, concerning the applicability of Marxism-Leninism to conditions in the United States at that time, were you taught substantially the same as you were taught at the 1930 school?

A Subsantially the same.

* * *

(tr. 105) * * *

Q All right.

Mr. Lautner, subsequent, you just described what took place in general terms at the 1930 National Training School —subsequent to that time did you, yourself, participate in any teaching program of the Communist Party?

A Yes.

Q What is the first such instance that you, do you recall?

A The first one was right after I got to Canada. I was instructed by the Central Committee of the Canada Party to organize a school there. Then later on I was also assigned as a Director of a school in Cleveland, Ohio.

(tr. 106) Q Now with respect to this Canada school, did you, what materials did you use?

A The same material that we used in the New York school where I was a student.

Q What curriculum did you follow?

A The same curriculum. It was patterned after the curriculum in teaching material of the New York school.

Q Now you mentioned the school in Cleveland. When was this school?

A That school was 1933, I think.

Q What was your connection with this school, Mr. Lautner?

A Well, that school was in two sections. The one section of that school was held in New York and the other section was held in Cleveland. One covered Eastern Seaboard for student material and the other the Midwest, and I was Director of this Midwest Section of that Training School.

Q Approximately how long did this Training School last, Mr. Lautner?

A Approximately three months.

Q And with respect to the curriculum?

A It was the same as the curriculum, approximately the same as the curriculum in the first New York National Training School which I had attended.

Q Now, Mr. Lautner, subsequent to the 1930, you say (tr. 107) '32 classes—

A '33; yes.

Q Classes, did you participate in any other teaching program of the Communist Party?

A Yes. At the time I was a Section Organizer in New York, I conducted numerous so-called indoctrination classes, new members, classes, in that section in New York, and

from time to time group lectures for small groups, and then again in parts of 1946 and 1947 and part of 1948 I taught.

* * *

(tr. 126) * * *

Q Now, Mr. Lautner, you mentioned that you had attended two schools in the Communist Party. What was the second school you attended?

A The second school was the National Training School of the Communist Party in 1941.

Q Where was it held?

(tr. 127) A That school was held in New York City.

Q Where in New York City?

A In various places. In apartment homes, in apartment houses, and from day to day we went to a different place to hold the school.

Q Now how did you come to go to this school?

A Well, I was reassigned, after being almost five years in West Virginia, as a State Chairman, and before my reassignment took place, I was instructed, I was assigned to go to school again.

* * *

(tr. 129) * * *

Q Now, Mr. Lautner, at this time were you told what the National Training School was?

MR. TAYLOR: May we have by whom and when, Your Honor please?

MR. KEENEY: First, were you told, Mr. Lautner?

THE WITNESS: Yes.

BY MR. KEENEY:

Q By whom?

(tr. 130) A By the Director of the school, Pop Mindel.

Q What did he tell you the National Training School was?

A Well, he told us at the time when we first assembled that knowing, well, that we were Party leaders, that we had not come out to relax, nor we were on a vacation, that we would work harder than we ever worked before, that it cost a lot of money and effort and talents on the part of the Party to take us out of activity and put us in a school of this sort. Pop told us that normally if the situation wouldn't, the world situation wouldn't be as it was, we would be sent to the Lenin School. However, the Party has made every effort to get the best available instructors for this class and it will be a high-level class and he told us that we will have to organize ourselves into two groups and to develop competition between one group and the other group.

He outlined the work program, how we will study. He introduced the instructors and the subject matters, the curriculum. He assigned specific functions to students, who will be in charge of certain aspects and problems of the classes, as such. These were in substance his opening remarks to the class.

Q You referred, you said Lenin, you said Mindel referred to the Lenin School; continuing on the Lenin School, what was the Lenin School, did he say?

(tr. 131) A The Lenin School was a school to develop professional revolutionaries for the Communist Party, and it was considered the highest school that was available at one time for America—

MR. TAYLOR: Show where this school is, Your Honor.

THE WITNESS: Yes, in Moscow.

BY MR. KEENEY:

Q Moscow, Russia?

A That is right. It was available for cadre personnel of the American Party and personnel of other Communist Parties for education, Communist education.

THE COURT: And what was that school?

THE WITNESS: This, Your Honor, was in 19—in February, 1941.

THE COURT: That was when you were attending for the second time?

THE WITNESS: That is right.

BY MR. KEENEY:

Q Now, Your Honor has just made a point. You were attending a National Training School for the second time. How did this school differ from the first National Training School you attended?

A It was a, it was the National Training School under the supervision and sponsorship of the Communist Party. (tr. 132) The highest school that the Communist Party can afford for a limited number of its high functionaries.

whereas, the 1930 school was a National Training School of a different type that was organized by the National Hungarian Bureau of the Communist Party, and there were all types of National Training Schools organized either by a National School or by some subcommittees of the National Committee, but this was the class under the charge of the National School Director himself, Pop Mindel.

These classes, these schools were known as the highest Communist Party Schools in the United States.

Q Did you pay tuition at this school, Mr. Lautner?
A No.

Q Do you know whether or not any other students paid tuition?

A No, no one paid tuition in this school.

Q Did you receive any money for expenses?
A Yes, we all received money for expenses.

Q From whom did you receive the money for expenses?
A From the National Office of the Communist Party, the assistant to the National Treasurer of the Communist Party. Every Saturday we got our allowance. He was known as Benson, and Black, and Kitsos. He went under different names.

Q But he held the office?
A Assistant to the National Treasurer, who was William Weiner at that time ,W-e-i-n-e-r.

(tr. 133) Q Now, Mr. Lautner, how many hours a day did you attend this school?

A The day was broken into three parts. We had a full class that lasted from nine to about one in the morning, and then we had a group session from—

Q That is nine o'clock in the morning until one o'clock in the afternoon?

A Yes, sir. Then we had a group session anywheres from 2:30 or three o'clock to about 5:30 or six o'clock every day. Then in the evening research and preparations of papers, home work, for the next day's class.

Q How long did this continue?

A From the beginning of February to the first of May, I think. The class finished just about the day before the first of May, in 1941.

Q Mr. Lautner, did you have any position at this school?

A I was secretary of the school.

* * *

(tr. 134) Q Now you say this individual, Pop Mindel, was the Director of the School, in addition to that did he have any position in the Communist Party?

A Yes, he was the School Director of the cadre developing or personnel developing in the Communist Party.

* * *

(tr. 148) Q Mr. Lautner, in substance, what did James Ford teach at this school?

A Well, the Party's role in the struggle for Negro rights, for equality in the North and equal opportunities in the North and self-determination in the South. In substance, these were the questions that were raised under his subject matter.

* * *

Q What were you taught with respect to self-determination?

(tr. 149) A Well, at that time the Party policy was that the Negro people in the South, especially in the Black Belt, which is a thickly populated Negro area, have the right to declare themselves as a nation and have a right to separate from the United States and become a free, independent Negro nation, and that was the Party policy at that time.

* * *

(tr. 150) Mr. Lautner, you referred to an individual by the name of John Williamson as having taught at the (tr. 151) school, I ask you with respect to Williamson the same question, did he hold any position in the Communist Party as of that time?

A At that time he was just released from being District Organizer of the Communist Party in Ohio, was drawn into the national leadership, and he was teaching in that school.

Q Subsequent to this time and during your membership in the Communist Party, do you know whether or not John Williamson held any other position in the Communist Party?

A Oh, yes.

Q What positions?

A He was considered on the key organizational specialist in the Party. He was Organizational Secretary during the, when I came back from the Army; he was Secretary of the Communist Political Association. At the '45 convention he was elected to the National Committee and became a member of the Secretariat of the National Committee, and around '47 there was a reorganization on the top, and he became Labor Secretary of the Communist Party and he held that position at the time I left the Communist Party.

Q I believe you said that he taught a course on the Communist Party; is that right?

A That is correct.

Q Would you tell us in substance what Mr. Williamson taught?

A Well, he dealt with the Party of a new type, as Lenin (tr. 152) envisaged the Communist Party, what it, what it should be, how it should give leadership and guidance in the everyday struggle in all phases of human relationships. However, that the Party, as such, being the vanguard of the working class, must have its roots in the working class, the Party must have a policy of concentration on basic industries, the quality of work, how it is determined in the Communist Party, the contributions of individuals as leaders or members of the Communist Party, what determines their activity, whatever they do, how does it bring closer the realization of the final objectives of the Party, the role of the Party and the system of the dictatorship of the Proletariat. The role the Party plays in creating subjective conditions. These are the subject matters that, these are the problems that John Williamson raised in, under the heading of the Communist Party.

Q Did he teach anything with respect to particular industries?

A Yes, basic industries that determined the volume of production, like steel, coal, transport, mining, in general, the rubber, where production is being done, where transportation plays a leading role in the process of production.

Q What did he teach in connection with the role of the Communist Party, the relation to these industries?

A That the Communist Party must be rooted in these

industries because these industries, the workers in these (tr. 153) industries represent the decisive sections of the working class whom the Party must win over for its program.

* * *

(tr. 153) Q Mr. Lautner, you said, I believe, that George Siskind taught a course on Marxism-Leninism at this school?

A That is right.

(tr. 154) Q How long did that course last, approximately?

A Well, that course lasted about three weeks. We had six days, a six day week, so we had about seventeen or eighteen—yes—thereabouts—sessions with George Siskind on Marxism-Leninism.

Q Do you recall what Siskind taught on the subject of Marxism-Leninism?

A Yes.

Q What did he teach?

A That—well, first of all, that Marxism-Leninism is the philosophy and theory of the working class; that it is a revolutionary theory, it is a revolutionary philosophy and when we went into various aspects of Marxism-Leninism, the theory of the state, the theory of strategy and tactics, the dictatorship of the Proletariat, the Proletarian revolution, the question of war, the question and the struggle against economism, many, many aspects of Marxism-Leninism.

Q Mr. Lautner, did you use any particular books or texts in connection with Siskind's course?

A Yes, we had a practically complete library there, what

was available in the English language, on Marxism-Leninism, the writing of Marx, Engels, Lenin and Stalin. We had the collected works, we had the selected works, we had the Little Lenin Library Series. We had additional material like these three books, a compilation of excerpts from the (tr. 155) classics on various topics and subject matters, like Strategy and Tactics, The Theory of the Proletarian Revolution, the Dictatorship of the Proletariat. We had the Decisions of the Sixth World Congress. We had the United Front by Dimitroff, D-i-m-i-t-r-o-f-f, and other material available in our study in this school.

* * *

Q Mr. Lautner, you mentioned three books as having been used in this course by Siskind. One was Strategy and (tr. 156) Tactics, as I recall, and the other, Dictatorship of the Proletariat, and the third, Theory of the Proletarian Revolution.

What, if anything, did George Siskind say with reference to these books?

A Well, first of all, he said it's a compilation of excerpts grouped around a certain key topic, and in our work to, in our home work, instead of looking through collected or selected works, what Lenin had to say, or in works of Stalin, or other volumes, we had a short-cut with these books to look up pertinent excerpts to strengthen our arguments in whatever topics we were assigned as to at home work, so it was useful in the school. It was used as tools in our work.

Q That is the three books were used for, as tools in your work?

A That is right.

Q Now, subsequent to this class in school, did you make any use of these books?

A Yes.

Q What use did you make of them?

A I made the same use of them in '47 and '48 in teaching Marxism-Leninism, made references to it, and urged the students to secure it, and to, in order to help them in their self-study, after they leave the classes.

Q Do you know whether or not these publications were (tr. 157) being used in the Communist Party as of about the time you left in January, 1950?

A They were used; yes.

* * *

(tr. 161) * * *

MR. KEENEY: I am reading from Strategy in various stages of the revolution.

Strategy determination of the direction of the main blow of the Proletariat at a given stage of the revolution. The elaboration of a corresponding plan of disposition of the revolutionary forces, the main and secondary reserves. The struggle to carry out this plan during the whole period of a given stage of the revolution.

BY MR. KEENEY:

Q Mr. Lautner, with respect to this passage I ask you whether or not George Siskind taught you concerning the applicability of this passage to conditions in the United (tr. 162) States at that time, namely, 1941?

MR. TAYLOR: Could I hear that question read back?

(The reporter read the question.)

MR. TAYLOR: Whether George Siskind taught? No further objection.

THE WITNESS: Yes. Yes.

BY MR. KEENEY:

Q What did he say concerning the applicability?

A Well, the applicability is in the fact that strategy is worked out for the whole epoch, for the whole era. This era is the era of imperialism and the decline of imperialism and the ascendancy of socialism. This era began approximately at the turn of the century and will last until socialism will be victorious throughout the world. The basic strategy is based on this concept and all other plans are subordinate to this basic objective, to this basic strategy, and all other plans are known as tactical plans in carrying out this main, basic strategy, this main, basic objective, so it's the over-all plan; all other plans are subordinate to this basic aim.

* * *

(tr. 163) * * *

Q Now, if the Court please, I'd like to direct a question to Mr. Lautner with respect to a passage found on page 48 of this same exhibit, and reading from page 48,

> The main task of contemporary Communism in Europe and America is to acquire the ability, to seek, to find, to determine correctly the concrete path or the particular turn of events that will bring the masses right up to the real decisive last and great revolutionary struggle.

* * *

(tr. 164) * * *

Q Mr. Lautner, with reference to this passage that I (tr. 165) have read, what, if anything, did Siskind have to say concerning it?

A Well, in reference to this particular passage, in reference to all passages that were read in the National Training School, that was one over-all statement, that Marxism-Leninism is applicable to the United States just as well than anywhere else in the world, that the United States is no exception, that the Communist Party of the United States thought any ideas of exceptionalism, that the United States is exempt from certain basic principles and premises of Marxism-Leninism, that, and that this was a long discussion in this class, that showing it, how Marxism-Leninism stands out in the light of some of the mistakes made by the American party from time to time adhering to such policies of exceptionalism, he pointed out the struggles under the Lovestone leadership which the Party was accused of having a theory of exceptionalism, taking certain exceptions to Leninism.

Lenin, himself, points out that at one time Marx envisaged the possibility that in such countries like the United States, or England, where there was no, no crystallized and hard bureaucracy developed yet in government, where there were no big standing armies yet, where the state apparatus was not autocratic, where there was semblance of democracy in practice, in the progressive stage of capitalism, there was a possibility that to bring about a fundamental (tr. 166) change in the economic, political and social structure could be achieved through an evolutionary process, but Lenin points out that the observations of Marx at the

time he made them may have been correct, and Lenin further stated that since the turn of the century and particularly the participation of the great powers in the First World War, a strong bureaucracy developed in both countries in the government apparatuses, large armies developed in these countries, and for that reason, and monopoly capitalism developed, and for that reason neither England nor the United States are any exceptions any more in the struggle to bring about a fundamental change through a revolutionary process in these countries.

So this concept that there is no American exceptionalism covers all basic principles of Marxism-Leninism, not only this passage alone.

Q Mr. Lautner, with reference to the principles that, two principles we read to you from this book, did you subsequently teach in the Communist Party with reference to those principles?

A The same principles as I announced here awhile ago were taught in '47 and '48. Particularly in '47, '48, in the light of Browder's mistakes of revisionism, when we made every effort to cleanse the Party from this exceptionalist concept once for all, particularly in '47 and '48, a very strong emphasis was laid in the struggle against manifesta- (tr. 167) tion of revising Marxism-Leninism like Browder attempted during the war.

Q If the Court please, I'd like to read from page 56 of this same volume, Government's Exhibit 13, and frame a question around it.

> The revolutionary will accept a reform in order to use it as a means wherewith to link legal work with illegal work, in order to use it as a screen behind which

his illegal activities for the revolutionary preparation of the masses for the overthrow of the Bourgeoisie may be intensified. This is what the revolutionary utilization of reforms and agreements in an imperialist environment means. The reformist, on the other hand, will accept reforms as a pretext for renouncing all illegal work, to thwart the preparation of the masses for the revolution and to "rest in the shade" of reforms that have been "bestowed". This is what reformist tactics mean. This is the position in regard to reforms and agreements under imperialism.

Mr. Lautner, at the 1941 school what did George Siskind say, what, if anything, did George Siskind say with reference to this passage, the principles contained?

A The same concept as I announced here before pertaining to all passages on Strategy and Tactics, on the Prin-
(tr. 168) ciples of Proletarian Revolution, on the Theory of the Dictatorship of the Proletariat, on all basic Marxist-Leninist principles that America was no exception, that reformism was the policy of the Second International, and that had nothing in common with Marxism-Leninism, and Marxism-Leninism only utilized reforms against, in the struggle for the improvement of working conditions, or for the working class, but did not stop right there. It went further beyond that.

They utilized these reforms to further the basic objectives of the Marxist-Leninist principles.

Q Subsequent to this school, did you, yourself, teach these principles in any Communist Party classes?

A That is right.

Q What did you teach in that?
A The same. In substance, the same.

MR. KEENEY: If the Court please, at this time I would like to read two short paragraphs from Government's Exhibit 15, Theory of the Proletarian Revolution, and likewise frame a question to the witness around the passage.

I am reading now from page 90 of Government's Exhibit No. 15 in a paragraph entitled, Main Types of Revolution in the Epoch of Imperialism and the Growing of the Bourgeois Democratic Revolution into the Proletarian Revolution. Subject head one.

(tr. 169) Struggle for the dictatorship of the Proletariat in the main types of revolution.

I am reading there under the following:

The variety of conditions and ways by which the Proletariat will achieve its dictatorship in the various countries may be divided schematically into three main types: Countries of highly developed capitalism, United States of America, Germany, Great Britain, and so forth, having powerful productive forces, highly centralized production with small scale production reduced to relative insignificance; and a long-established Bourgeois democratic political system in such countries, the fundamental political demand of the program is direct transition to the dictatorship of the Proletariat. In the economic sphere the most characteristic demands are expropriation of the whole of large scale industry, organization of a large number of states, Soviet forms, and in contrast to this a relatively small portion of the land to be transferred to

the peasantry, unregulated market relations to be given comparatively small scope, rapid rate of Socialist development generally, and of collectivization of peasant (tr. 170) farming in particular.

BY MR. KEENEY:

Q Mr. Lautner, did George Siskind discuss the principles found in the passage which I have just read?

A Yes.

Q Would you tell us what he said concerning that applicability to the United States as of 1941?

A Well, in substance, the same. The United States was considered a highly developed industrial country. As a matter of fact, a leading imperialist country, like Great Britain and Germany, and so forth, and a transition from capitalism to socialism was to be direct through the dictatorship of the Proletariat. There was to be no intermediary or transitory or provisional state apparatus or state structure and in contrast with that, in colonial countries, under the domination of monopolist capitalism, the revolutionary aim was towards a national liberation movement, a national indedepndence, which was a transition towards a socialism, a transitory form of government towards socialism.

But here again, that the United States was no exception to the basic Marxist-Leninist principle of direct transition.

Q Mr. Lautner, were you taught at the 1930 National Training School, that is the first one you attended—

A That is correct.

(tr. 171) Q —substantially the same with reference to the applicability of these principles to the United States?

A That is correct.

MR. TAYLOR: Your Honor, before he answers, could we have again who taught and when? I guess he said 1930.

THE WITNESS: 1930.

MR. KEENEY: All right.

BY MR. KEENEY:

Q Mr. Lautner, I ask you that question with respect to the applicability of these teachings in 1930.

A Yes, both.

Q Who taught you?

A Yes, both James Lustig on Leninism and John Santo on Decisions of the Sixth World Congress of the Communist International.

Q What did they say?

A The same thing in substance, no exceptionalism.

Q You use this term "exceptionalism". Would you explain to us what that is as it was explained to you?

MR. TAYLOR: By whom.

BY MR. KEENEY:

Q Mr. Lautner, was the term "exceptionalism" explained to you in these classes?

A Yes.

(tr. 172) Q By whom?

A By Siskind.

Q That's '41?

A Yes, '41, by Sam Carr, by Pop Mindel, by everybody, and I explained it just ten minutes ago.

MR. TAYLOR: I request that "everybody" be stricken and that the names alone remain in the record, Your Honor; said everybody taught him.

THE COURT: Ask him who he means by everybody.

BY MR. KEENEY:

Q Who do you mean by everybody?

A Everybody in the Communist Party, U.S.A., whoever opened his mouth against Lovestoneism and Browderism, taught, talked.

MR. TAYLOR: I ask that be stricken as beyond the knowledge of the witness.

THE COURT: Yes, let him specify as many as—just a minute—as many as he can recall.

BY MR. KEENEY:

Q Give us as many as you can recall who taught.

A For instance, in the leadership Foster, Dennis, Williamson, whenever the subject matter of Browderism came up, they all condemned exceptionalism.

Q And who are Foster, Dennis and Williamson?

(tr. 173) A They were Party leaders. Foster was Chairman of the Party, Dennis was General Secretary of the Party, John Williamson was Labor Secretary of the Party, and so forth, and so on.

Q I don't know whether we brought this out. Mr. Laut-

ner, but subsequent to this time did you teach these principles?

A That's correct.

Q What did you say in connection with them?

A In substance the same thing.

Q Mr. Lautner, I ask you whether or not a book entitled, Problems of Leninism, was used in connection with Siskind's course?

A Yes.

Q I ask you whether or not you recall my handing it to you yesterday, a Little Lenin Library volume series entitled, Problems of Leninism, by Joseph Stalin?

A Yes.

Q Is that the same?

A Same.

Q Subject matter to which you refer, same text?

A That's correct.

MR. KEENEY: If the Court please, at this time I'd like to read from Government's Exhibit No. 6, which is the (tr. 174) Problems of Leninism, page 19, a final paragraph on page 19, first paragraph on page 20 and frame a question around those readings.

I am reading from the exhibit in Chapter Four which is entitled, The Proletarian Revolution and the Dictatorship of the Proletariat.

THE COURT: You say that is No. 6?

MR. KEENEY: No. 6 in evidence; yes, sir.

Can such a radical transformation of the old Bour-

geois system of society be achieved without a violent revolution, without the dictatorship of the Proletariat? Obviously not. To think that such a revolution can be carried out peacefully within the framework of Bourgeois democracy which is adapted to the domination of the Bourgeoisie, means one of two things. It means either madness, and the loss of normal human understanding, or else an open and gross repudiation of the Proletarian revolution.

BY MR. KEENEY:

Q Mr. Lautner, I ask you whether or not George Siskind discussed the principles which I have read to you.

A Yes.

Q At the 1941 class?

A Yes.

(tr. 175) Q With respect to those principles, what do you recall his saying?

A Well, these principles were in substance where the principles discussed and no exceptions were taken to it.

Q Were you taught concerning the applicability of these principles to the United States at that time?

A That's correct. Yes.

Q Subsequent to this time did you teach these principles in Party classes?

A That is correct.

Q Did you teach substantially as Siskind taught?

A The same; yes.

Q And when were these classes?

A 1947, 1948.

* * *

(tr. 177) Q Mr. Lautner, I will ask you whether or not George Siskind at this 1941 school discussed a concept known as Proletarian Internationalism?

A That is correct, yes.

Q Will you tell us what he said concerning Proletarian Internationalism?

A Well, in substance that, that the fundamental interests of the working class and all oppressed led by the Communist Parties throughout the world are identical. There is a community of interest amongst them and there should be and there must be a fraternal relationship between these forces: that if any group in any part of the world suffers a defeat and that is a defeat for the whole working class and for every Communist Party. This concept was in substance discussed, and that the fact that the highest form of solidarity, expression of solidarity of Proletarian Internationalism was the Communist International that gave leadership and guidance to all the Communist Party throughout the world, and we are bound by Proletarian internationalism and through the organization the Communist International, and that the decisions of the Communist International are made in the light of effecting the good of the whole, of (tr. 178) all working classes all over the world, and that Parties should aid each other, those Parties who have more experience in the class struggle, the richer experiences, should help and aid the weaker parties, as smaller Parties in their problem, solving their problems, and this type of a relationship is a wholesome and best relationship and must be maintained in order to succeed against imperialism, and this concept was discussed under the heading of Proletarian Internationalism.

(tr. 179) Q Did Siskind make any reference to the membership of the Communist Party of the United States in

the Communist International during this discussion?

A Yes.

Q What did he say with reference to it?

A In reference to that it was stated that the Communist Party of the United States withdrew from the Communist International the previous year because of Voorhis Act.

THE COURT: Because of what?

THE WITNESS: Voorhis Act.

BY MR. KEENEY:

Q What, if anything, did he say concerning the applicability of these principles that you have described of Proletarian Internationalism to the conditions of 1941 in the United States?

A It didn't make any difference at all, the withdrawal from the Communist International, because it was stated and it so happened I was at the September, 1940, convention when the Party was withdrawn from the Communist International, where Browder gave the report, and it was stated that the, this withdrawal was forced upon the Communist Party, and it in no way altered our position on (tr. 180) Proletarian Internationalism or the applicability of the basic principles of Marxism-Leninism in relation to the C.P.U.S.A.

Q You say Browder gave a report on this subject to the Communist Party in convention of 1940?

A Yes.

Q Who was Browder at that time?

A Browder was the General Secretary of the Communist Party.

* * *

(tr. 188) Q Mr. Lautner, you said that an individual by the name of Sam Carr taught at the school. Did you tell us what his subject matter was?

A Yes, the History of the Communist Party of the Soviet Union.

Q Did he use any text in connection with the class?

A Yes, we used all the material that I previously stated, plus the History of the Communist Party of the Soviet Union, a book.

Q Mr. Lautner, would you tell the Court and jury what you recall in substance, what you recall of Carr's teaching (tr. 189) on the subject.

A Well, in substance we studied the growth and development of the Communist Party of the Soviet Union, Bolshevik Party, the economic and social conditions in Russia, and, in the, prior to the revolution what were the forces at play in the prerevolutionary era around the turn of the century, how various types of movement developed in Russia, like the Narodiks, N-a-r-o-d-i-k-s, of various types of social movements in Russia, how the seed of socialism were brought into Russia, by whom, how a Socialist, how a movement, working class movement developed on the basis of Socialist principles, how this movement later on split into two branches. One was the so-called Menshevik Branch and the other branch was the Bolshevik Branch. One was for reforms and the other one was for revolution. The role of the Bolshevik Party in the, in gaining the hegemony over the Russian working class, and influence among the peasantry against the S.R.'s, the Social Revolutionaries, the revolution itself in 1917, the Bourgeois Revolution headed by Kerenski, the failures of that leadership, how the Bolsheviks captured power in 1917, fall, and the line of the Bolshevik Party after the revolution, the establishment of the dictatorship of the Proletariat, the various prolemics in the course of

these developments between outstanding spokesmen within the Bolshevik Party and this other group, this was in sub-
(tr. 190) stance the subject matter studied in Sam Carr's class.

Q Now, as I understand your testimony, Carr referred to a difference between the Bolsheviks and the Mensheviks?

A That is correct.

Q I ask you whether or not he indicated whether the Communist Party in the United States would pattern itself after either of these groups?

A Well, the Communist Party of the United States patterned itself on Lenin's concept of a Party of a new type which the Bolshevik Party was, a monolithic party, a party that had professional revolutionaries, a party in which there was democratic centralism, a party in which there was unity of will to act as one, a party in which there was discipline, a party which had a single-minded purpose, had of itself a task ahead of it, a party which recognized the leading role of the Bolshevik Party of Russia as a victorious party which already succeeded, which went through a revolution and captured power.

In that sense the Party; yes, did pattern itself on the Bolshevik Party.

Q Did you discuss the 19— I ask you whether or not Carr discussed the 1917 revolution in Russia?

A Yes.

Q Did he tell you whether or not there was more than one revolution in Russia in 1917?

A Well, we knew that already, but we discussed it.
(tr. 191) There was a Bourgeois Revolution in 1917 which overthrew tsarism, that Bourgeois Revolution—

* * *

(tr. 192) MR. KEENEY: If the Court please, Mr. Lautner, at this time would you tell us what you were taught in substance in connection with this class by Sam Carr on the History of the Communist Party of the Soviet Union?

THE WITNESS: Yes. What was taught, what I described just a while ago, the history and the development of the Bolshevik Party in Russia, the history and the development of social conditions in Russia, class relationships, (tr. 193) how the Bolshevik Party captured power in 1917 from the, from the Bourgeoisie under the leadership of Kerenski, what kind of a party the Bolshevik Party was, how it stood up in various crucial times in the course of the revolution, how it smashed the power of the Bourgeoisie in that country, how it dealt with the peasantry; all these problems were discussed and studied under the leadership of Carr in that class.

BY MR. KEENEY:

Q Well, was there a discussion with reference to the fact that there were two revolutions in Russia?

A There was.

Q In the course of that discussion was it brought out who participated in the first revolution?

A There was.

Q And on the basis of that discussion would you tell us who participated?

A On the basis of that discussion it was discussed that the Bourgeois Revolution was headed by social reformists who gained control over the dissatisfied masses, who were war-weary, who suffered because of it, of the series defeats by Russian Armies, because of lack of food and lack

of—there was just a war-weariness and Kerenski and the social revolutionaries, the Mensheviks, the Cadets, the Ca- (tr. 194) dets meant the Constitutional Democrats—these forces unitedly succeeded in overthrowing tsarism, and they were in the process of consolidating their power. This defeat of the tsarism came about in February, 1917. By November, by November the same year the Bolsheviks captured power from the Constitutional Democrats, from the Mensheviks, from the S.R.'s under the leadership of Alexander Kerenski.

Q Let me ask you this, Mr. Lautner. During your discussion was it brought out what type of government was set up in February, 1917, in Russia?

A A liberal form of government was set up under Kerenski's leadership. However, according to the History of the C.P.S.U., this liberal form of government was for a continuation of the war and some other parts of their program that the Bolsheviks took exception to. It was to tend to stabilize it and bring about the ascendancy of capitalism in Russia, and the Bolsheviks were against this regime.

At one point, in around April, there was a possibility, while the Bolshevik Party was still a very small group, to go along in a peaceful transitory period, but by the end of July, after a big demonstration in Petrograd, this approach was dropped and the Bolsheviks prepared from the July days on for the seizure of power, and by November, 1917, by force and by violence they succeeded in capturing the government, in capturing the state power in the main (tr. 195) industrial centers like Petrograd, Moscow and other places, and as they went along later on they succeeded also on the countryside.

Q The Bolsheviks seized power from the Kerenski Pro-

visional Government?

A That's correct.

Q Mr. Lautner, I will ask you whether or not in this course by Sam Carr on the History of the Communist Party of the Soviet Union, whether a concept, or concept known as the just and unjust war, whether these concepts were discussed?

A It was.

Q Would you tell us the substance of the discussion on just and unjust war as led by Sam Carr?

A Yes, that the Bolshevik or Communist concept of war is this: The Communists are not pacifists, that they are against war, but the Communists believe that there are two types of wars. There are just wars and unjust wars. The Communists support just wars. Just wars are national liberation movements where the Communists will support the aspiration of a people to become independent. They will support that kind of a war.

The class struggle itself is a just war and the Communists support that, but the Communists will not support a war between imperialist countries or a Communist will not support a war in any, in which an imperialist country is trying to subjugate a smaller nation or a, an oppressed people. (tr. 196) In that type of war the Communists will fight against the imperialist even if that, and much more so, if that imperialist country happens to be the country in which these Communists work and live.

Q Mr. Lautner, while this class was being conducted, was World War II going on?

A Yes.

Q Was there any discussion of into which category World War II fell?

A At that time, in 1941, spring, the characterization of the war was that it's an imperialist war, and the Communists did not support that war at that point.

* * *

(tr. 200) Q All right. Mr. Lautner, will you tell us now whether there was a change in the Communist Party?

A Yes, there was a change.

Q What was the change?

A The change was that on June 22, 1941, the Soviet Union was attacked by Hitler's forces and the character of the war with that changed from an imperialist war, the war over night became a just war, at that particular point; that was the substance of the announcement. Later on there (tr. 201) were some other discussions after the war how to characterize the whole period of the war. There were some differences there, but at that time it was changed from an imperialist war to a just war.

THE COURT: Well, did I misunderstand you? I thought you said a few minutes ago that in 1942 World War II was labeled an imperialist war.

THE WITNESS: In 1939, 1940 and up to June 22, 1941.

MR. KEENEY: For the purpose of clarification, Mr. Lautner, when was that school held?

THE WITNESS: This school was held in the spring of 1941, February, March, April, and it ended on May 1st.

BY MR. KEENEY:

Q It was held prior to June 22nd, 1941?

A That's correct.

* * *

(tr. 222) Q Mr. Lautner, in 1945 did you attend any conventions of the Communist Party?

A 1945.

Q Yes, sir.

(tr. 223) A Yes.

Q What convention or conventions was—

A That was the emergency convention of the Communist Party. I think it was the fourteenth convention, or thirteenth convention.

Q Fourteenth what?

A Thirteenth convention.

Q Of the National Communist Party?

A That's right.

Q Prior to that did you attend another convention?

A Yes.

Q What was that?

A In '36 in '38, '40 and '42, there are two conventions in '40. There was a special convention called about two months after the regular convention in 1940.

Q In 1945 prior to attending the National Convention, did you attend another kind of convention of the Communist Party?

A Yes, the New York State Convention of the Communist Party.

Q In what capacity did you attend the National Convention of the Communist Party in 1945?

A As a Party leader and a returned veteran, as a fraternal delegate.

Q Did you have any function at the convention?

(tr. 224) A Yes, to attend all the sessions, to take part

in the convention, and also took certain assignments from J. Peters, who was in charge of security of that convention.

Q What assignments were you given by Peters?

A The assignment was to keep out of the so-called—there was a room where the technical staff was working, and there—where the leading comrades gathered for discussion, to keep everybody who had no business in there out of that place.

Q Was this convention open to the public?

A No.

Q Was it open to all members of the Communist Party?

A No.

Q To whom was it limited?

A It was limited to about 110 participants, from delegates who came from all parts of the United States.

Q Was there a main report given at this convention, Mr. Lautner?

A Yes.

Q And who gave it?

A William Z. Foster gave the main report.

Q Who was William Z. Foster at that time?

A William Z. Foster at that time was a member of the Executive Board of the Political Association.

Q Now, would you tell us in substance what you recall (tr. 225) William Z. Foster saying in this main report?

A Well, in substance his report dealt with the revisionists mistakes of Earl Browder under the convention to reconstitute itself into Communist Party, and projected certain corrective measures for the reconstituted Communist Party. This was in substance his main report.

Q What were the corrective measures projected?

A By reconstituting the Party, to go back to the basic principles of Marxism-Leninism, and to go back to the revolutionary principles of Marxism-Leninism.

Q Did he make any reference to the so-called classics of Marxism-Leninism?

A He did.

* * *

(tr. 228) Q Mr. Lautner, did an individual by the name of Eugene Dennis give a report at the convention?

A He did.

Q Who was Dennis at that time?

A Dennis at that time was a member of the Executive Board of the Political, Communist Political Association.

Q Did he make any reference to the so-called classics?

A He did.

Q What reference did he make?

A The same reference, to go back—let's go back and study the basic classical works.

Q Who should go back and study?

A The Party membership, to better understand the basic principles of Marxism-Leninism.

Q Do you recall whether or not Dennis said anything else at the convention?

A No, I have no recollection.

Q I ask you whether or not Dennis discussed the reconstitution of the Party in itself?

A Yes.

Q What did he say?

A I recall he took the responsibility for what happened (tr. 229) under Browder's leadership. He took the personal

responsibility for the dissolution of the Party in the South, and he made a pledge that he will do everything in his power to see that the Party will be reconstituted as speedily as possible in the Southern States.

Q Did he urge that the convention take any action with respect to reconstituting the Party in the Southern States?

A Well, the convention did take an action for the reconstitution of the Communist Party in the South; the convention did take that action.

* * *

(tr. 230) Q Mr. Lautner, you have made reference previously in this trial to an individual by the name of John Williamson. Did he make a report at the convention?

A Yes.

Q What, if any, position did he hold in the Party at the time he made the report?

A At that time he was National Secretary of the Communist Political Association, and in the convention he was Chairman of the Constitution Committee.

Q And what report did he give?

A He gave the report for the Constitution Committee on the Constitution to be adopted by the 1945 Convention.

Q Will you tell us what you recall of the report on the constitution as given by John Williamson?

A Yes. On the constitution—well, he had two reports. He had a general report. Then he had a report specifically on the constitution to be adopted. He read the constitution section-by-section, and there was a discussion on each section of the constitution as it was presented by him. After (tr. 231) the discussion on the constitution section-by-section, there was a discussion on the constitution as a whole, and a vote on the constitution as a whole.

Q Do you recall a discussion on the floor with respect to the preamble of the constitution?

A Yes.

Q Do you know whether or not questions were asked from the floor with respect to the preamble?

A There was.

Q Do you recall a particular question?

A Yes.

Q What was it?

A When he read the preamble, that was the first section that he read, and there was a discussion on that preamble. One of the delegates from the New York delegation got up and asked Williamson that where in that preamble is the dictatorship of the proletariat. Instead of Williamson, Dennis got up and answered that, "That is in there. Even the blind can see it."

Q Subsequently was the constitution, was a constitution adopted?

A Yes.

Q At this convention?

A Yes.

Q In addition to the adoption of the constitution were (tr. 232) any Party programs adopted at this convention?

A Well, the resolution contained—yes, the resolution was adopted which outlined the task for the Party and in the next coming period. The very title of the resolution was The Present Situation and the Next Task.

Q First of all, let me ask you whether or not there was a decision to change the name of the Party or the group?

A No.

Q Was it Communist Political Association Convention?

A There was only one vote in that convention. The vote was to reconstitute the Communist Party. There was no vote taken to dissolve the Communist Political Association. There was only one vote taken to reconstitute the Communist Party, and that vote was taken with the constitution, when the Constitution Committee Reporter, John Williamson, reported, when the constitution was adopted and voted upon, the Communist Party was reconstituted with that constitution.

Q What additional programs were approved by the convention, if any? Let me ask you specifically whether there was a discussion of a re-education program.

A No. You see, once the resolution, The Present Situation and the Next Task Ahead was adopted out of that program, out of that resolution, a three-pronged program of activities in the Party after the convention, that three-pronged program was the reorganization of the Party, the (tr. 233) reorganization of the reconstructed Communist Party. The re-education of the Party membership, and a developing of a concentration policy on basic industries.

* * *

(tr. 243) Q Now, Mr. Lautner, you testified that at the 1945 convention there was a discussion about a program of re-education in Marxism-Leninism.

A That is correct.

Q Was such a program adopted?

A Yes.

Q Did you take any part in implementing that program?

A Yes.

Q Do you know on the National Level what action was taken to implement this re-education program?

A The National Educational Commission set up a program for all kinds of classes, for classes for beginners, for classes for intermediary study, and classes for advanced study, National Educational Commission prepared numerous outlines to guide instructors in it, in the work, in this work, in educational work, and I think Max Weiss, the (tr. 244) National Education Director at that time, gave a report outlining the work of the National Educational Commission and a proposal from this Educational Commission to the Party.

Q What is that? Was Weiss' work in this regard published? Do you know?

A Yes, it was published in Political Affairs.

Q Political Affairs. Do you know approximately when?

A Well—

Q Do you know what year?

A '46 or somewhere around there. It was after the, after the reconstitution convention, months afterwards.

Q Mr. Lautner, you referred to the National Education Commission preparing outlines. Do you have in mind a particular outline?

A Well, there was one outline that I know of that I used, also as one of my guides in teaching, which was published by the National Educational Commission.

Q Did you receive a copy of this?

A I had numerous copies. I got one from the New York State Educational Director. Then I got some up in the stock room on the ninth floor. I had quite a number of them. Then New York State reproduced that outline for instructors in the New York State Program.

Q You said one of the copies you obtained you got on

the ninth floor, the ninth floor of what?

(tr. 245) A The ninth floor of the building which housed the National Committee of the Communist Party.

Q What is the ninth—

A The stock room was the room where printed material, Party material was kept.

* * *

(tr. 246) Q Mr. Lautner, I now hand you Government's Exhibit No. 25 for identification which purports to be an Outline on the Fundamentals of Marxism, and ask you if that is one of the outlines to which you referred in your testimony?

A Yes.

Q Is the outline to which you said you received a copy at Party Headquarters?

A This is the outline of which I had a copy; yes.

Q Of which you had a copy. Did you make use of this outline when you were a member and officer of the Communist Party?

A Yes, it was one of my guides in teaching.

Q Did you ever discuss this outline with educational officers of the Communist Party?

A Amongst the other; yes, amongst the other problems; yes, this outline, too.

Q Do you recall any particular educational officers of the Communist Party with whom you discussed this?

A Yes, well, I had numerous discussions with Alberto (tr. 247) Moreau, M-o-r-e-a-u, Moreau, he—e-a-u—that's right, who was the School Director of the New York State Organization of the Party, and whose office was right across from mine in the State Organization, and we had numerous discussions with teaching methods, and how to prepare out-

lines on various topics, headings on the classes of Marxism-Leninism.

Q Did you discuss this outline as for use in preparing Communist Party classes?

A Yes.

* * *

Q Mr. Lautner, did you personally use this outline in preparation for teaching of Party classes?

A As I said before, it was one of my guides in my preparations for teaching.

(tr. 248) Q Did you teach classes subsequent to the 1945 convention?

A Yes.

Q What were the circumstances surrounding your teaching these classes?

A Well, for one fact, I, in that period, around 1947, I had a—I was sick, and I was relieved of certain work and urged to help in teaching classes, and I undertook to teach intermediary classes in New York State. I had about three classes with Section Functionaries from New York Counties, Section Organizers, Section Organizer secretaries, Educational Directors, I had a number of classes in Industrial Sections. I had one class with the Bakers Section of the Communist Party. I had another class with Building Construction Workers of the Communist Party New York. I had a full-time class for a week with the Furriers Communist Party Functionaries in its Furriers Union, the Furriers Section of the Communist Party. I had a class with Painters up in the Bronx. These are some of the classes that I recall now that I undertook to teach, and my subject matter was Marxism-Leninism, Political Economy.

In all these classes except one, and I also teach Party Organization, Democratic Centralism, Party Structure, in all these classes except one, and that was the Furriers Class where I taught Marxism-Leninism and Political Economy, but not Party Organization. In the others; yes.

* * *

(tr. 257) Q Mr. Lautner, these classes you conducted as a member and leader of the Communist Party, were they supervised by anyone?

A Yes.

Q By whom were they supervised?

A Well, the classes that I was teaching in were supervised by the New York County School Director, Ben Semenowsky, and one class that I taught in the Furriers full-time class, school, the class was supervised by the Section Educational Director. I think his name was Dave Miller. M-i-l-l-e-r.

Q Did any of these individuals ever attend your classes?

A They were right in the class, while I was instructing in the class.

Q In your discussion with Alberto Moreau did you discuss the curriculum and books to be used in the classes?

A Yes. The curriculum and the books were worked out by the New York States and the New York County School Commissions and with every class we were to have an ample supply of classics for, available to the student in the class.

Q Mr. Lautner, I believe you told us that you taught Marxism-Leninism?

A That is correct.

(tr. 258) Q At some of these classes; is that correct?

A That is correct.

* * *

Q Mr. Lautner, in formulating your definition of Marxism-Leninism for your classes, what did you use as a guide, if anything?

(tr. 259) A I, well, I used as a guide the famous definition of Stalin on Leninism. You can find it in both Foundations and Problems of Leninism in which he says that Leninism is Marxism in the epoch of imperialism and Proletarian Revolutions, that it is the theory and practice of the Proletarian Revolutions in general, and that the theory and practice of the dictatorship of the Proletariat in particular. This, this definition by Stalin was my guide all along.

Q Well, I ask you if what you taught was substantially identical with what was taught to you at the 1930 and 1941 National Training School?

A Correct. Yes.

Q Now you defined what Marxism-Leninism is. Will you tell the Court and jury what you taught to your students with reference to Marxism-Leninism?

A The same thing as I was taught when I was a student in the National Training School. In substance, the same thing.

Q And what is that, Mr. Lautner?

A Well, Marxism-Leninism, and as a subject matter. I mean—

Q What did you teach with reference to the applicability of Marxism-Leninism to the United States?

A Well, here again the theory of exceptionalism was raised and that America is no exception to the applicability of the teachings of Marx, Engels, Lenin and Stalin to the (tr. 260) United States.

Q Did you discuss the Proletarian Revolution?

A That is correct.

Q Did you discuss the requisite conditions for the Proletarian Revolution?

A That is correct.

Q Would you tell us what the conditions are for, as you taught them and as they were taught to you, for the Proletarian Revolution?

A Yes. Yes. There are two sets of conditions necessary for a successful Proletarian Revolution. One set for conditions is objective and the other set of conditions is a subjective set of conditions. The objective set of conditions are a disruption in the smooth running, the state apparatus of capitalism, a war situation, a war, disruption in the economy of capitalists in the capitalist state, mass unemployment, wide dissatisfaction with the way things are, where the government of a capitalist state has to resort to all types of improvisations to maintain itself, where there are symptoms of a breakdown, where extra measures are necessary on the part of the government to maintain itself. These are one set of conditions.

Now parallel with that, if there is a strong Communist Party in that given country—not necessarily numerically strong. Numerical strength does not decide the strength of (tr. 261) the Party. The influence of the Party and leadership, and the ability to exploit a situation determines the strength of Communist Party; not numbers. One parallel with these objective conditions, if there is a strong Communist Party that has and enjoys the influence of the decisive sections of the working class in the basic industries, in addition to that, and enjoys the confidence of other sections of the workers, if also in addition to that, enjoys the

confidence of large sections of the so-called allies of the working class, like poor farmers, and in the United States the Negro people, and in addition to that, that the Communist Party is able to neutralize sections of the middle class, when those two sets of conditions exist, then the Proletarian Revolution will be successful.

Q Is that all that was taught to you, Mr. Lautner, at the 1930 and 1941 Training School in substance?

A That is correct.

Q Mr. Lautner, what is the relationship, if any, between the day-to-day activities of the Communist Party and the subjective conditions as it was taught to you?

Let it go at that. As it was taught to you.

MR. TAYLOR: I will object, Your Honor. I ask for specifications on when and where and by whom.

BY MR. KEENEY:

(tr. 262) Q Was this taught to you, Mr. Lautner?

A Yes.

Q When?

A All through the twenty years that I was in the Communist Party as a Party Functionary, my activities were always subject to a check-up and evaluation in every post where I was, and there was an evaluation of my work. The evaluation depended on a number of things. Whatever I did as a functionary in the Communist Party, how did it pay off in terms of new Party members, in terms of increased circulation of the Daily Worker and the Sunday Worker and Political Affairs, in terms of building so-called bridge organizations around the Party, in terms of how did

the tactics that we employed in a given district or section or wherever I was, how did my work bring closer the realization of the final aims and the final objectives of the Party?

Now in this sense tactics are evaluated, if they are tactics that do bring closer to realization of the final aims of the Party, are good tactics. If they do not bring closer to realization of the final aim of the Party, they are bad tactics. They may help here, there, but they did not add nor distract from the aims of the Party as a whole.

Q Then as I understand you the day-to-day activities of the Communist Party are directly related to the ultimate goal of the Communist Party?

(tr. 263) A Of course, they are.

Q Mr. Lautner, was the dictatorship of the Proletariat one of the subjects covered by you—excuse me—strike that.

With reference to that last question, did you answer that as you were taught—did you teach that as you were taught at the 1930 and 1941 National Training School?

A That is correct.

Q Now did you cover the subject of the Dictatorship of the Proletariat in any of your teachings?

A Yes.

Q When you taught this subject matter, did you teach it in—strike that.

Did you discuss the theory of the direct transition when you taught your classes on the Dictatorship of the Proletariat?

A Yes.

Q Previously had this been taught to you at any time?

A Yes.

Q Where?

Q Both in the 1930 schools and in the 1941 schools.

Q By whom?

A In the 1930 schools by James Lustig on Leninism, and by John Santo on the Decisions of the Sixth World (tr. 264) Congress, in 1941 by George Siskind, and in 1947, 1948 in my classes on the question of the struggle against revisionism, Browderism, exceptionalism, under the heading of that subject matter of Marxism-Leninism.

Q Mr. Lautner, what did you teach concerning the direct transition?

A I already, I think, explained that once this morning, that America, the United States was no exception, that here the transition is a direct one from capitalism to socialism via the dictatorship of the Proletariat. I already explained that this morning.

Q All right. Now, Mr. Lautner, did you teach a course on revisionism?

A It was part of Marxism-Leninism; yes.

Q What did you teach on revisionism?

A That it is a manifestation, a deviation which is one of the shortcomings of the American Party, and it has nothing in common with the fundamental principles of Marxism-Leninism. However, these revisionist errors, so-called deviations from, deviations to the right, crept up in our Party once before in 1929, and it led into the swamp of reformism, it led back to capitalism, support of capitalism. In substance, that is pointed out in Browder's revisionist errors. That was it in substance.

Q Mr. Lautner, when you were a student in the 1930 and (tr. 265) at the 1941 training school, was revisionism dis-

cussed.

A No. What was discussed was a manifestation of right-winged division. Right deviation in the Party during the Lovestone period.

Q Was Lovestoneism a revision of Marxism-Leninism?

A No, Lovestone didn't revise, try to revise Marx in the same sense as Browder did, but it was a right deviation. Lovestone's main mistake, was the overestimation of the strength of American capitalism in 1929, and on the basis of that bad policy, tactical policies, were part of Lovestone's program in that period.

Q What did you teach with reference to Browder's revisionism, Mr. Lautner? I think you described generally what Browder revisionism was.

A I already did that.

Q What did you ask the students to do in connection with your classes on Marxism, revisionism, what, if anything, did you ask them to do?

A Well, to fight against any manifestation of revisionism that would creep into the work of their branches or sections, or wherever they are. I—in substance that is it.

Q You asked them to study anything in particular?

A Yes, to study the classics, to study the documents around the 1945 convention, the Duclos articles, Foster's report, Williamson's report, Dennis' report.

(tr. 266) Q Are those the materials to which you refer, are they in any documents that are in evidence?

A It is in evidence here already; yes. In the pamphlets, the Struggle Against Revisionism and also in the September, 1945, Political Affairs.

Q Mr. Lautner, in the course of your teaching did you

discuss the principle of democratic centralism?

A Yes.

Q Had you been previous—had you been taught at the 1930 and 1941 National Training School with reference to democratic centralism?

A That is correct; yes.

Q Did you teach substantially what had been taught to you?

A Yes.

Q All right. Now what did you teach on the subject of democratic centralism?

A On the subject of democratic centralism my teaching was the monolithic nature of the Communist Party on the organizational structure: the freedom of discussion within the Party and the scope of discussion within the Party of the so-called freedom of discussion, and the Party's structure itself and Party discipline.

Q What did you discuss on Party discipline?

A Well, on Party discipline, that—that all Party mem-
(tr. 267) bers must adhere and carry out Party decisions to the best of their abilities, and even if they disagreed with a decision, or with a line of activities, they must carry it out nevertheless. They can raise their objections through proper channels, but the unity of the Party forbids any groupings or any dissensions, organized dissensions, that the Party members must adhere to the Party decisions and carry it out, and act and work in a disciplined fashion.

Q Mr. Lautner, in teaching on democratic centralism, as you gave it to your class, that documented anywhere, the substance of that teaching?

A Yes.

Q Where?

A In a number of places. There is, I think, in Foundations of Leninism.

Q Is that the exhibit in evidence here, sir?

A Yes. You will find one section there. I think it is the last section, the Party, by Stalin. Then—

(The witness was handed an exhibit.)

That is right. Here it is. Begins at the—it is Article 8, The Party, begins on page 107, and all the way through to 124.

Q Democratic centralism is discussed in there in connection with the Party?

A Yes. Then there is in the History of the C.P.S.U. (tr. 268) a reference to democratic centralism on the structure of the Party, what type of organization the Party shall be, where democratic centralism is raised.

Q Excuse me. That is this book?

A Yes, that is right. Then, in Peters' Manual on Organization there is a section on democratic centralism. Well, offhand these are it.

Q That is the document you identified here yesterday?

A That is right. Offhand these are some of the sources that I can make reference to, and possibly in Problems of Leninism also, where he discusses the system of the dictatorship of the Proletariat; in reference to the Party there, he may, he may raise the question of discipline in democratic centralism.

* * *

(tr. 275) * * *

Q Would you explain to the Court and jury, using the chart that is now set up in the courtroom, the manner in which you taught this course on Communist Party Organization during this 1947-'48 period?

A Yes.

Q Would you proceed?

A Shall I?

Q As you did in your classroom.

* * *

(tr. 276) THE WITNESS: The basic organization in the Communist Party is the Party Branch or Party Club. That is the organization to which every member of the Communist Party must belong. A Communist Party member must belong to a basic branch. He can be on top committees anywhere along the structure, but he must belong to a basic branch where he pays dues, and attends and carries out assignments for the Branch.

The branch of the Party operates in a community, in a small community, a number of blocks or streets. That kind of a branch of the Communist Party is known as a Community Branch or a Community Club. The members of that branch are mainly concerned with problems in that particular community, with issues that would be, would be picked up in that particular committee, whether they are economic or social issues, issues around which that Community Club could become an influence in that neighborhood, And gain sympathy and gain support for whatever (tr. 277) that club undertakes in that community.

If that Party Branch works in a factory, that basic

organization is known as a Shop Branch of the Communist Party. That Shop Branch takes up issues that would be to the benefit of the workers in that shop, issues which would endear that membership, Communist Party membership in that factory to the workers, issues that would give, would tend in the direction of the Party gaining support, an influence over the workers in that particular shop.

If the Communist Party in a given community or in a given town does not have enough Party members in a shop to form a club or a branch, but if in that particular industry a number of clubs in a number of factories or in a number of trades, similar trades, the Party has a sufficient number of Party members, they are organized into an Industrial Branch or into an Industrial Club.

I will give you an example. For instance, painters—well, painting shops are very small, but there are painters in the painting industry who work for various contractors. They would be drawn into an Industrial Club as painters or bricklayers would be drawn into an Industrial Club, or bakers would be drawn into an Industrial Club, or truck (tr. 278) drivers would be drawn into an Industrial Club, because there would hardly be any one particular trucking contractor who would have enough Communist Party members within that company to form a Shop Branch right there and then. Now these are the various types of branches.

The branch is led by a branch executive. The branch executive is elected by the branch membership. It is composed of a Branch Chairman or Branch Organizer, and a Branch Educational Director, a Branch Membership Secretary, Finance Secretary, Press Director, Group Cap-

tains and Literature Director, whatever other functions are necessary in that particular branch, and it does not mean, necessarily; that all these functionaries in a branch belong to the branch executives, but the branch executive is drawn out of these functionaries under the chairmanship of the Branch Chairman or the Branch Organizer.

Now there are a number of these branches in a larger section of a city or a county. These branches, Industrial, Shop and Community Branches, come together once in every two years, or once a year, and they organize a com- (tr. 279) mittee above themselves known as a Section Committee. A Section Committee is composed of the most qualified and most experienced communists elected from all these branches and this Section Committee gives leadership and guidance to all the branches under their supervision in their day-to-day activities. This Section Committee is elected by a Section Convention to which Section Convention these branches send their delegates. At the Section Convention the Section Committee is elected.

Now in a larger community like a city where there may be a number of sections, the same procedure is followed in electing a, either a City Committee or a County Committee. A County Committee may give supervision and guidance to a number of Sections, and through its Sections to branches in the lower organizations of the Party.

Above this is the District Committee, or State Committee of the Communist Party. Now the State Committee or District Committee of the Communist Party gives leadership and guidance in the day to-day activities of the Party in that given District or that given State Organization. In

the United States there were District Organizations of the (tr. 280) Communist Party which were composed of more than one State Organization, like the New England State of the Communist Party was one District, with Boston with its headquarters, or the California District which gave also leadership and guidance to Arizona and Hawaii, and, on the other hand, there were Districts where there were two Districts in one State because of the importance of the District, of the State. For example, in Pennsylvania there are two Districts of the Communist Party; one in Philadelphia, and one in Pittsburgh, and because of the manyfolded activities of the Communist Party in a given District, or in a given State, the Communist Party District Organization or District Committee or State Committee gathers around itself the most able, most capable Communist Party members in that State or in that District and assigns to these leading Communists various specialized functions pertaining to that State or that District. Such specialized functions are heading Legislative Committee of the Communist Party in that State, or heading the Literature Department of the Communist Party in that State, or its Labor Commission in that State of the State (tr. 281) Organization of the Communist Party, or the Youth Commission, or the Review Commission, the Negro Commission, the Women's Commission, the Veterans Commission, Press Circulation, Cultural Activities Commission, Finance Committee, Farm Commission, whatever necessary commission is needed in that State to accelerate Communist Party activities in all phases of human relationships.

Now the District leadership is also more centralized. When the State Committee or District Committee is elected within that larger body, State or District Committee, a

smaller committee is elected, a committee known as the Board, State Board, or District Board, and within the Board a Secretariat. A Secretariat is the centralized authority in that State, or District, carrying out the mandates of the State or District Committee in that particular organization.

The higher of the State or District Organization is the Executive Section, the Organizational Section, who organizes all these manifold activities and keeps every Party member in all over organizations busy carrying out the (tr. 282) Party activities. Now these State Organizations, and their top committees are elected once every two years at State or District Conventions. At these same conventions they also elect delegates to the National Conventions of the Communist Party.

Now the period of 1945-1948, the Convention at 1945 elected a National Committee of approximately fifty, fifty-three. It also elected a National Review Commission or Disciplines Commission at the 1945 Convention. The task and the duty of the National Committee was to carry out the mandates of that 1945 Convention. In order to properly do that, the National Committee had to organize and appoint various subcommittees of the most able and most capable Communist Party members available on National level to carry out the manifold activities of the Communist Party. Among such commissions at the National level were the Labor Commission. This Labor Commission, by the way, broke down into subcommittees, such subcommittees where the Steel Commission, Auto Commission, Commission on Mining, Textile Commission, Maritime Commission, all led under a group of Party leaders, headed by the Labor Secretary of the Labor Commission of the Com-

(tr. 283) munist Party, the Educational Commission, Negro Commission, Youth Commission, Veterans Commission, Women's Commission, Press Committee, Nationality Groups Commission, Legislative Committee, Cultural Commission, Farm Commission, National Training School Commission, Finance Commission, Publications Commission, and other temporary committees. From time to time, the above-mentioned commissions were strong committees working with the National Committee from convention to convention. The National Committee, in order to better supervise this work, organized an Organizational Committee. The Organizational Committee was headed by one of the leading members of the National Committee who saw to it that there is no conflict in time element and composition of personnel in the various commissions and outlined a work schedule and time schedule for all these commissions to function.

The National Committee also within itself elected a National Board. A National Board which a smaller active committee, that took care of Party problems in the day-to-day work of the Parties—the National Board within itself elected a National Secretariat, which was composed of three or four members up to 1947 when a reorganization (tr. 284) took place in the National Board, where a number of leading Party members were removed and a General Secretary and a General Chairman of the Party was elected in 1947 at one of the plenary sessions of the National Committee.

Well, this is in substance what I taught on the part of the structure, Party Organization in 1947 and the spring of 1948 in the National Training School where I taught Party Organization.

BY MR. KEENEY:

Q Mr. Lautner, would you mind pointing out to the Court and the jury the various positions you held in the Communist Party, where they fit into that chart?

A Yes. Well, I was Secretary Organizer. I was a District Organizer. I was a member of the Nationality Groups Commission. I was a member of the National Review Commission and I was a Secretary of the New York State Review Commission.

These are some of the functions that I had, and I was also at one time head of one of the Nationality Groups, specifically the Hungarian National Bureau of the Communist Party, supervised by the Nationality Group Commission of the Communist Party.

Q Mr. Lautner, while you're there, would you also (tr. 285) point out where the North Carolina State Organization of the Communist Party and the Chairman of that Organization fits into that chart?

A Well, to my understanding, if I am not, I know the District Organizer around 1947-'48, Bernie Friedlander, who was a District Organizer of two states over here—I may be mistaken, but North and South Carolina was one District, if my recollection is correct. Now they would fit in here. This is the District Organization and each State would be part of this District Organization.

* * *

(tr. 286) Q Mr. Lautner, in describing the organizational setup in the Communist Party you made reference to election procedure to be followed at the various levels. During your membership in the Party was this election

procedure followed universally?

A In some instances, no. In other instances—no, it depended on what was more suitable for the Party leadership.

Q Now in connection with your own selection for position were you always elected to the positions you took or you assumed?

A No, not necessarily. No.

Q Mr. Lautner, with reference to the chart now, that chart covers the period, as I understand, from 1945 until 1948?

A That is correct.

(tr. 287) Q Now you left the Party in January of 1950; is that not correct?

A That is correct.

Q Would you describe—I am going to ask you a question with reference to any changes in the Party structure between 1948 and the time you left in 1950—were there any changes?

A Yes. What change?

Q What changes were made?

A One obvious change, one big change was that on the National level the National Review Commission, was not elected at the 1948 Convention. Instead of that it was appointed by the elected National Committee of thirteen.

Q Is there any other change, Mr. Lautner?

A Well, down in the Branch, there on Branch level, there are changes all the time in leadership and whatnot, but the structure as such, was the same when I left the Communist Party, with the execption of that change on the question of election of the National Review Commission in 1948. It was appointed.

Q Excuse me. Maybe I didn't hear you correctly. Was there any change in the membership of any of these groups?

A I wouldn't know.

Q Was there a change in the membership of the National Committee?

(tr. 288) A Yes, as far as numerical change is concerned, numerical composition. In 1945 a National Committee of fifty-three was elected and in 1948 only thirteen were elected to the National Committee.

MR. TAYLOR: Thirty or thirteen?

THE WITNESS: Thirteen.

BY MR. KEENEY:

Q Were the changes you have outlined, do they represent the Communist Party Organizational Structure from the time of the 1948 Convention until the time you left the Party?

A With, to my knowledge, with this additional change, the reduction of the National Committee in 1948 was also followed by the key State Organizations. I know New York did, by the reduction of the New York State Committee after 1948.

* * *

(tr. 298) Q Mr. Lautner, during the time you were in the Communist Party were you ever a State Organizer?

A Yes, District Organizer or State Chairman and State Secretary; yes.

Q What were your duties?

A My duties were to give leadership and guidance to the membership in my particular district, to develop their, and deepen their understanding of Marxism-Leninism, to supervise the activities of the various leading cadres, or leading personnel in that particular district, to develop Party activity and carry out the policies of the Communist Party in that particular district, to build the Party membership in that district, to represent the Party's National Committee in that particular district, to be the phase of the Party in that particular district, and to assure of faithfully and loyally carrying out the mandate of the National Committee in that particular district. These are in substance the (tr 299) tasks that I were confronted with when I was a District Organizer.

Q When you were a District Organizer, what was the relationship between you as a District Organizer and the National hierarchy of the Communist Party?

A I was the representative of the National Committee in my particular district. I consulted with him, with the National Committee, I attended National Committee meetings, I was called into conferences into the National Office frequently. I was in constant communication with them, was a close relationship with the National Committee.

Q During your membership in the Party were the qualifications for the State Chairman and District Organizer ever discussed?

A Well, I was a State Chairman. I was a District Organizer. These were the qualifications.

Q Were the qualifications for a State Organizer, State Chairman ever discussed at the Training Schools you attended?

A It may have been. I know one qualification was not discussed in my presence at any time.

Q What was that?

A Whether the National Committee had any confidence in my loyalty to the National Committee. They never discussed that with me. I was an individual and I was at the mercy of their judgment.

(tr. 300) Q Well, you were a District Organizer. How did the National Committee exercise supervision over you?

A Through checking my activity in the District. I had to give periodic reports of my activities. National Committee members came into my District to check the activities of the District, of the District, and my work showed up in increased membership, in circulation of the Daily Worker, of building all types of organizations around the Party. My Party activity in the trade union movement, how was this activity reflected in State C.I.O. or A.F.L. conventions. These were the criteria by which I was judged whether I am a good or a bad District Organizer.

Q What was the criteria for determining; do you know what the criteria was for determining whether you were a good or a bad District Organizer?

A Well, let me see. Oh, yes. In 1940 in the National Convention, in 1940 in the National Convention I was elected to the Presiding Committee of the convention by exclamation—acclamation, by acclamation I was put on the Presiding Committee because of the work that I was doing in West Virginia at that particular time.

Q You were put on a Presiding Committee because of your work?

A That is correct. That was a form of recognition of my work in the State of West Virginia at that time.

(tr. 301) Q Was the loyalty of a State Chairman or Party Organizer to the National Committee ever dis-

cussed?

A Not with me personally, but if they have no confidence—I know in others, they had no confidence, they were removed.

Q Confidence in what, Mr. Lautner?

A Confidence in properly representing the National Committee in their respective district.

Q Is that a lack of ability you're speaking of?

A It may be a combination of things.

Q Of what?

A That may be lack of ability, it may be creating a bad impression about the National Committee in the district in which he works. I saw that happen, too. Removal of District Organizer because the District Organizer started factional activities against the National Committee. That was Sam Dunn in Philadelphia, and other reasons, personal behavior also entered into the picture of a quality and whether the National Committee has confidence in the individual.

* * *

(tr. 302) * * *

Q Well, are you able to answer that question without answering—can you do it?

A May I have that question again?

(The reporter read the question.)

MR. TAYLOR: I have no objection further than for the witness telling what his experiences were, but not to general statements on what that experience was.

THE COURT: Well, the question states the basis as

experience, does it not?

THE WITNESS: Yes. Well, the answer would be a—I would have a negative approach where I saw that the respective District Organizer lost the National Committee confidence and was removed because of the certain factors—

MR. TAYLOR: Well, it seems to me the witness ought to state when those occasions were.

* * *

(tr. 306) * * *

Q Mr. Lautner, based on your observation in the Communist Party is a loyalty to the National Committee of the Communist Party a requisite for continuance in State and National office in the Communist Party?

* * *

(tr. 307) * * *

A That is a prerequisite, that the National leadership has confidence in the person's loyalty who represents them in the various Districts.

* * *

(tr. 319) * * *

Q Mr. Lautner, I believe at the end of the court session yesterday you had made reference to a program of industrial concentration adopted at the 1945 National Convention, did you not?

A That is correct.

Q Did you participate in the putting of this program into effect?

A Yes.

Q To what extent did you participate? First of all, would you tell us the first contact that you had with this industrial concentration program after the 1945 Convention.

A The first phase of it was the organization of Industrial Branches in Industrial Sections right after the Reconstitutional Convention. At that time I was asked to organize all the building trades members of the Communist Party in New York City into an Industrial Section, and that was my assignment for awhile.

Q Who asked you, Mr. Lautner?

(tr. 320) A 1946, the New York State Labor Secretary of the Communist Party, Hal Simon, S-i-m-o-n, and—

Q. In giving you this assignment, what, if anything, or asking you to take this assignment, what, if anything, did Simon say?

A Well, he told me to get in touch with the personnel who were in charge of the Party's registration at the end of the 1945 year, and around February of 1946, I sifted through all the registrations, all the County and picked out in every County in New York City those Party members that were either painters or plumbers or electricians or carpenters or bricklayers and called them, group-by-group, and trade-by-trade, together to a meeting, and organized them into Industrial Branches. And then I got myself a Section Committee around that Industrial Section, and I functioned with that Section up to about, for about a year.

Then the second phase of it was—

Q Mr. Lautner, the first phase, if you may stay there a minute—did Simon say anything with respect to whether

or not the Party members should operate openly as Party members?

A Wherever possible; yes, to operate openly, but where it was not possible, or it was to the disadvantage of the individual or the Party Branch, it was not advisable to work openly, particularly in an A.F. of L. Union like the Electricians Union, in the Painters Union; yes, because (tr. 321) there the Party was still in control of District Council No. 9 of the Painters Union in New York City.

Q In your discussion was any publication recommended to you for your reading, in your discussion with Simon, prior to your taking up your activities?

A At that particular time; no.

Well, there were Williamson's reports to the 1945 Convention and there were a lot of conferences and discussions on beginning to involve a concentration policy, and I have no recollection at this time of any particular material that I can make reference to.

Q Mr. Lautner, you were referring to the second phase of your activity. Did there come a time when you ceased to be active in these building trades area?

A Yes, yes. That was, I think, January or thereabouts, in 1947. I was put on a committee to reorganize completely New York County on a concentration basis, and I was functioning on that committee and we selected New York County as a transport concentration, and then later on I went into the Transport Region, the Concentration Region, to organize, reorganize the Region from its previous structure that we had there.

Q Was this a Planning Committee that you were a member of?

A That is correct.

(tr. 322) Q Was there a head of that committee?

A Yes, the Executive Secretary of New York County, Jim Tormey, was the head of this committee.

Q Now in addition to your activities on this Planning group, did you participate in the actual operating level?

A That is correct.

Q Would you tell us what you did.

A Well, my specific assignment was to go into Chelsea. That's the region of the Lower West Side in New York. It's from the Battery all the way up to about, oh, 53rd Street, to make a survey as to its docks, the railroad docks on the West Side, the teamsters' sheds, the Pennsylvania Railroad Station and Railway Express, to make a survey of physical location of these places, the possible forces that we can organize for concentration work in this Chelsea Region, and I worked at this aspect of concentration work from about January, 1947, to May, 1947. Then I was drawn out of there.

Q Did you have any—I wonder if you could describe to the Court and jury the methods, how you operated in this concentration group.

A Well, we had in that Chelsea Region a Maritime Industrial Section of the Communist Party. Alongside that Maritime Section of the Communist Party, Industrial Section, we also had a Longshore Concentration Section of Industrial Units that were work—were composed of Party (tr. 323) members actually working on the docks.

Now to make the work of the Maritime Industrial Section and the Longshore Industrial Concentration Section more effective, we had to implement from the Community

Branches from that particular area people —we had to integrate people into special groups to concentrate on the families who lived in that neighborhood of dock workers and maritime workers, sailors within the Maritime Unions, so that when issues are raised by the Industrial Sections on the docks around the ships, these Community Concentration Groups can raise similar issues with the housewives, with the wives and families of these particular workers, so that when the husband comes home after work, he can understand what his wife is talking about, and she can understand what he is talking about on the docks; to coordinate their thinking processes along class struggle lines so that the Party can reach, build its influence in that Concentration Region. And that was my task.

This implementation to concentrate on the families in the neighborhood of these Industrial, where these Industrial areas were, and from the Battery all the way up to about 33rd Street.

Q Do I understand the industrial areas in which you concentrated were in transport?

A Transport. They were truck drivers, longshoremen, stevedores, sailors, Railway Express workers and railroad (tr. 324) workers at the Pennsylvania Station and also a further, up around 70th Street; it reached all the way up there. There was a freight yard of the New York Central Railroad Company on the West Side.

Q Now, Mr. Lautner, in the many deliberations of this Plan Committee with respect to Industrial Concentration of which you were a member, were there discussions as to the purpose of concentration in transport?

A Yes. That transport industry was designated by the National Committee for us as the major concentration for

New York City at that time.

Q Well, did you discuss what the purpose of concentration in transport was?

A Well, once we have a decisive influence among the transport workers, the Party would be in a very good position amongst the transport workers in respect to the final aims and objectives of the Party.

Q Mr. Lautner, in order to obtain your objectives in the transport area, what, if any, action was, were the Party members urged to take?

MR. TAYLOR: May we have that specified further? Urged by whom and when, please?

BY MR. KEENEY:

Q All right. Do you know whether any action was urged by Party leaders with respect to this transport concentration?

(tr. 325) A Of course. We urged the Party membership every day.

Q Who did it, Mr. Lautner?

A Well, I also was urged by the higher leadership, by the State leadership, by a—and the County leadership, and I urged. We had three sections in there. The Section leadership, the membership in day-to-day activities, leaflet distribution, house-to-house canvassing, making new contacts, getting acquainted with people in the block, special list on certain nationality groups, like Dalmatians, Yugoslavs, who were longshoremen in an area over there to pay special attention to Greek seamen in the area over there. I mean these were the day-to-day activities that were urged upon

us and we, I urged the Party membership along these lines.

Q In this connection were any Party members directed to take positions in certain industries?

A Well, in this particular area; no.

* * *

(tr. 371) * * *

Q Now, Mr. Lautner, after the 1948 National Convention of the Communist Party, did you have any contact with Robert Thompson?

A Yes.

Q Did you have any contact with him?

A Yes, I did. Why, I was in day-to-day contact with him in that period.

Q Did you have any contact with him with reference to a new program of the Party?

A Oh, yes.

Q When did this contact take place?

A This contact, there was a discussion, contact—I was —we were in the same office, I mean, in the same building, daily in contact. We had a discussion in, oh, about a week, week after the convention, shortly after the convention in 1948, the National Convention.

He told me to get a meeting place and he and Bill Norman and Hal Simon and myself will have a meeting to discuss certain security problems.

Q All right. Now who was Thompson at that time.

(tr. 372) A He was State Chairman of the New York State Organization of the Party.

Q Did he hold a position in the National Organization?

A He was a member of the National Committee.

Q And who was Bill Norman at that time?

A He was the Executive Secretary of the New York State Organization.

Q Who was Hal Simon?

A Hal Simon was Labor Secretary and—was head, the Review Commission.

* * *

(tr 373) * * *

Q Now, Mr. Lautner, did you subsequently have another meeting with Thompson?

A Yes.

Q When did that take place, approximately?

A The very next day we had an all-day meeting.

Q Where?

A On 20th Street near 7th Avenue in New York City in an apartment that belonged to a person by the name of Milton Baran, B-a-r-a-n.

(tr. 374) Q Did Thompson attend this meeting?

A Same four of us, Thompson, Norman, Hal Simon, and myself.

Q What, if anything, did he do an arrival?

A Well, he looked around. He went to the closet, clothes closet, he went to the washroom, he looked around all over, gave me a demonstration of his security consciousness.

Q Did he tell you what the purpose of the meeting was, Mr. Lautner?

A Yes.

Q What did he say the purpose was?

A Well, he, he was the person who opened up the dis-

cussion. He stated that at a recent meeting Foster, William Z. Foster, gave a report about his trip to Europe, and in the report there was one part of the report that is a problem for us to tackle. In his report Foster said that in his conversation and discussions with the International leadership abroad, it was the experience of the Communist Party in Europe that when they were forced to go underground, the experience was that there was a contraction of the membership of the Communist Party, Party about ninety per cent, that after the Party was declared illegal, about ninety per cent of the Party membership just disappeared, and it was a difficult task to organize about ten per cent of it into an illegal apparatus.

So on the basis of these experiences Foster suggested (tr. 375) that the Party leadership begin to think in terms of some kind of a parallel organization and to set up a parallel organization, and before any emergency situation develops to integrate about ten per cent of the party membership in such a parallel organization, an underground organization, and Foster also said that the best form of an organization and structure would be a three-system, one, two, three-system, and a type of organization that would function only in a descending way, that all instructions come from the top and all contacts would come from the top, and wouldn't go any, wouldn't go the other way; no contact from lower organization to up, to the organization on the higher level.

So on the basis of this report, Thompson said if our membership is approxmately thirty thousand now in the New York District, our problem is to integrate about ten per cent or three thousand of that membership in a, this kind of an organizational structure, and that we would have to

do it in a, in such a way that that ten per cent will be integrated that works in trade unions and in mass organizations and the membership integrated, the major criteria for integration would be their absolute devotion and loyalty to the Communist Party.

Then he drawed a picture, how it would work. He was drawing triangles over there.

Q Mr. Lautner, before you go into that, I would like to ask you a few more questions.

(tr. 376) You say Thompson said the, what he had in mind would be based upon the experience—

MR. TAYLOR: Is this a question, Mr. Keeney?

MR. KEENEY: I hope it to be, Mr. Taylor.

BY MR. KEENEY:

Q Thompson referred to the experience of certain European countries, did he not?

A Thompson referred to Foster's report to the National Committee in which the experiences of European Communist Parties were discussed.

Q The experience during what period of time, Mr. Lautner?

A Between the—let's see—between the first and second World Wars. The rise of Fascism and Hitlerism, that period.

Q Did he say whether or not the system that was discussed would be modeled on those systems?

* * *

(tr. 377) * * *

THE WITNESS: Well, I think I already said that that —we were to adopt a three-system, which was the experience of the Communist Party in Europe.

BY MR. KEENEY:

Q Do you know whether or not the Communist Party was successful in achieving power in any of these countries after World War II?

A Yes.

Q Was the Communist Party successful in achieving power in any of these countries after World War II?

A Yes.

Q Now, Mr. Lautner, you started to make reference when I interrupted you to something, some drawing being made by Thompson?

A That is correct.

Q And what was this? Would you continue and tell us what Thompson was doing?

A Well, he was drawing, he was drawing triangles on various levels and how it will break down and how many levels will we have by integrating approximately three thousand Party members, and it came to about seven levels. I think seven levels. Yes.

Q Mr. Lautner, did you ever reproduce the chart as drawn, reproduce these triangles as drawn by Thompson?

(tr. 378) A I did.

* * *

(tr. 381) * * *

Q Now, Mr. Lautner, using the chart that is now in evi-

dence as Government's Exhibit No. 33, I guess it is, would you describe what Thompson told you?

A Yeah.

Q And what he did on this occasion.

A Yeah.

Well, as he was drawing, which way can I stand—as he was drawing, he said that there will be three top leaders in this organizational structure. One person will be the political person of the structure on the top leadership. The other one will be the organizational person, and the third person would be the trade union mass organization person. Of the (tr. 382) three top leaders in the structure—the three top leaders will set a date, and this person, this political person will appoint three persons.

(Copies of the exhibit were handed to the jurors.)

Three persons; political persons, and only he from this three will know who these three people are. Likewise, this person, the organizational person will appoint three organizational persons on the lower level, and only he will know who those three are, and likewise, the trade union mass organization person in the top leadership will appoint his three on the lower level, and only he will know them. Out of this three at a certain date these three persons will be notified and identified to get together and get acquainted, that they are the leaders on that level. This level was the area level in New York State.

New York State was divided into three areas. The first area was New York City itself, and all the industrial sections in New York, and the Cultural Division of the Communist Party New York. The second area was Kings County, that is, Brooklyn, Queens County, that is Long Island

City, Astoria and Flushing, and Bronx County, the Bronx, and Westchester County. That was the second area, and the third area was Buffalo, Syracuse, Rochester, Schenectady and Albany and in the southern area and Johnson and (tr. 383) that part, that was the third area, so he appointed his three leaders for the three areas. He appointed his three leaders and he appointed his three leaders—the same procedure then followed on a County level and the same procedure followed then on a Region level.

Now here, because of the space, he was drawing that one region represents this whole organization. Now it comes down to Section level, Subsection level and Group level. So on the State level there were three integrated, on the Area level nine Party members, on the County level; twenty-seven, members, on the Region level eighty-one, on the Section level two hundred and forty-three, on Subsection level seven hundred twenty-nine, and on Unit level two thousand one hundred eighty-seven.

It will give a total integration of three thousand two hundred seventy-nine members in this new structure.

Now security, from the point of view of security—now let's take what happens on a County level. This person on a County level is known only to the County, to the Area Political person on top of him, and he knows the one, two, three, Political leaders that he has appointed on a lower level. This is one security measure. That one person, for instance, is only known by four other persons in the Party. No, five other persons in the Party. One, two, three, four, five, and his higher contact.

Now if a Party member is, let's say, on a County level (tr. 384) he can never get in touch with a person on the

higher level until the person on the higher level so decides to get in touch with him. He has to wait. But he can always get in touch with the three that he has appointed below. He can get in touch with them and discuss problems with them and give them instructions and whatever task or work has to be done.

So this principle of working downward gives an added protection of the higher levels in the organizational structure in the Party so that they have more security than being on the lower levels.

Now this organization was to be implemented on the higher levels and there was my task, was assigned to me. I had to line up on this level a whole chain of hiding places for party leaders. Places where persons can stay for an indefinite term of time, places where a person can stay for a specified term of time, and places where you can stay for an hour or an hour and a half to have a short meeting. I had to sort out many, many places like that, for to be available, for this leadership. Each leader on these three, on this top level, was supplied with an envelope full of apartment keys and to each key there were attached remarks, what time, and so forth, and what kind of an apartment it is.

We had to line up a whole chain of calling points, telephones, where messages can be left, if a person called a certain number, message could be left there and somebody calls (tr. 385) in and picks up that message by another telephone call to that same number. We concentrated particularly on places where there is somebody always home during the daytime, particularly young women who had children, small children. They'd have to be around the house, so that's the kind of places we were looking for, for that kind of a telephone contact.

Then we had to line up a whole chain of drop places. Well in that, we were fortunate because we had a pretty good Party organization in the New York chain drugstores and drugstores were lined up for drop places, and we exactly knew when the Party member is a druggist and in charge of the drugstore. At one time we lined up a whole, oh, about two dozen places like that for that purpose. My task was also assigned to me by Bob.

Q Who is Bob?

A Bob Thompson, to set up sensitive, short-wave radio sets. He instructed me to set up two of these sets. I did set up one in Essex, 43 Hallicrafter, Essex, 43, and that was set up in one of the person's who was on this top level, in his home out in Queens County. He also told me to—no—Bill Norman, the Executive Secretary, asked me to supply him a list of names, about twenty names, composed of reliable Party members who are, maybe not too well known for their Party membership, but in whom the Party has utmost confidence, who could be trusted anywheres from ten (tr. 386) to twenty thousand dollars per person, that the type of a person he would be, he would never change his loyalty to the Party, for let's say, for being entrusted with ten to twenty thousand dollars. He also raised the question of setting up an underground library for the Party.

Let's see. What else? These were the, yes, and also I was assigned to begin to work on talking to the legal Party leaders in the County, to begin to think in terms of setting up printing presses, and I was instructed to set up a photo, one or more photo offset equipment, printing apparatus, so that the Party has a press available when all other sources are dried up, where the Party cannot print any material any more openly.

Well, these were in the main the problems that were discussed over there and the assignments that I got at that particular meeting.

Q Mr. Lautner, what is the name you gave to this organization or system?

A The three-system, the underground system of the Party.

Q Did it also have another name that was used in the Party?

A Well, Bob mentioned at that time troika; troika is a Russian word, it means a three-system.

Q Did Thompson—

A Threesome.

(tr. 387) Q Did Thompson at this time tell you what the purpose of the underground structure was?

A Yes. Well, his phraseology was to—well, we were facing hard times at that time, to enable the Party to function under any and all conditions as an organized Party.

Q Was anything done in your pursuance of this?

A Yes.

Q Direction—what was done, just generally?

A Well, the vertical structure was beginning to be shaped. I put in on State level some of the horizontal aspects of the organization as I set up printing apparatus. I got all these places that he was asking for, and there was a check of the vertical structure at one point, somewhere around the middle of 1949, in some areas, it went down to the fifth level. In one area it was down to the sixth level and I, myself, went up to Upstate New York to check the third area, where we had certain difficulties on the vertical structure because the cities were far apart and

the integration was a problem.

Q Now, Mr. Lautner, referring to the horizontal structure, as you describe it, subsequent to the meeting with Thompson, did you meet with any other leaders of the Party with reference to the horizontal structure?

A Yes.

Q State leaders?

A Well, this initial meeting was about one week after (tr. 388) the '48 convention. From that time on up until I left the Communist Party, I had numerous meetings with Hal Simon, with Bill Norman, and then we begin to enlarge on our meetings a little bit. We involved other people, at one point; George Black Charney or Blake Charney, George Blake Charney was at one of our meetings, so was Mae Miller, or Mae Himoff, and then at one other meeting where we discussed one particular area and that was the area to Brooklyn and Queens County, I called in Isidor Bugan, B-u-g-a-n—yes B-u-g-a-n, Izzie, and Ben Davis from Brooklyn, to discuss specific problems in that area. They went too fast over there. And they got—they didn't integrate the right type of persons into their structure, so these were the meetings that I recall were held after this initial meeting.

Q Did you have any discussion with State leaders with reference in obtaining equipment?

A Yeah.

Q With whom did you have these discussions?

A Well, first of all, to obtain equipment I had to have money and I got about—I don't know—about six, seven thousand dollars from Hal Simon for buying these photo offsets equipment.

Then we start manufacturing a flat mimeograph machine which cost him thousands of dollars and we have to give advance money on that.

(tr. 389) Q Where did this mimeograph machine—do you have a model?

A Yes.

Q Where did you get it?

A I got a model from a person by the name—I knew him as Bill Stensil. Bill Stensil was a Spanish veteran, Spanish veteran, and he brought home from Spain a little flat mimeograph machine that he saw the Germans use in the International Brigade, and he gave that model to us and we made dies, got in contact with specialists in the field, made dies, and the little plant was set up to manufacture these machines out on White Plains Road in the Bronx.

Q Was this manufacturing conducted at the request of the Party?

A Yes.

Q Manufacture of these duplicating machines?

A That's right.

MR. TAYLOR: May we have the Party specified there?

MR. KEENEY: All right, What Party are you speaking of, Mr. Lautner?

THE WITNESS: The Communist Party, New York State.

MR. TAYLOR: I don't mean the Party; the person in the Party.

(tr. 390) THE WITNESS: Oh, gee. Now let me see. What's his name? I will get his name in a few minutes. I

mentioned the name in so many cases.

BY MR. KEENEY:

Q Mr. Lautner, while you're thinking of that, do you know who provided that money for this?

A The New York State Organization of the Party. It was part of our budget that was laid aside from previous years. The money came from that part of the budget that was laid aside for this purpose in previous years, and in the '49 budget we had a substantial amount designated or allocated for this purpose.

Q Do you know—

A Frank Shore. Frank Shore is the name of the person. Frank Shore. S-h-o-r-e.

Q Do you know how many, approximately, approximately how much was involved in the manufacture of these things?

A Up until the time I left the Party, I think about eight, nine thousand dollars; somewhere around that.

Q Mr. Lautner, did you discuss the subject of communications with any Party leaders?

A That is right.

Q With whom?

A In the summer of '49 with John Williamson. And also about the same time I think, about a month earlier, or so, (tr. 391) with a person by the name of Andy Remes, R-e-m-e-s.

Q What did you discuss in the field of communications?

A First, Andy Remes checked up on me, whether I had these Hallicrafters set up, and also he asked me to help him. He asked me to help him secure places for the level above

the, above our apparatus, New York State apparatus, so I was instructed by John Williamson to talk to him and then I directed him to a number of County Organizers out in Westchester, and to John Levine, and out in Nassau County, where there was a woman organizer out there.

Q What kind of communication equipment did you discuss, Mr. Lautner?

A With John Williamson, he told me to explore the possibility, to set up a short-wave sending apparatus that would be a chain all the way across the country for his main concern was to get out from New York up to approximately Albany or Schenectady, up around there, to have a safe communications system built up to that point.

And he suggested various methods, mobile, mobile setup, possibility of buying a small cruiser on the Long Island Sound somewhere that could be used for that purpose, or maybe a truck, and that was the problem he was confronted with, that we should be in a position to break out of New York with a safe communication up to approximately Albany.

Q Did you discuss the problem of individuals to handle (tr. 392) this equipment?

A No, he suggested it, that I should get in touch with some of the people in the unions who handle this type of activity in the communications union, or in, there are a lot of instructors in the Party who are teaching specially at that time television and radio in schools, to get in touch with these people, that they will help me along that line.

Q Mr. Lautner, you discuss in these discussions you mentioned discussions with Andy Remes.

A Yes.

Q What was Andy Remes at that time?

A At that time he was on leave of absence from the Wisconsin Organization where he was a District Organizer of the Party. He was called in by the National leadership.

Q How do you know that?

A He told me why we were—

Q Did anybody else tell you?

A John Williamson said that.

Q Who was John Williamson at that time?

A Huh?

Q Who was John Williamson at that time?

A He was Labor Secretary of the Party and a member of the National Committee.

Q Mr. Lautner, you mentioned before this mimeograph machine that was manufactured by the Party or at the (tr. 393) Party's request. Would you describe that mimeograph machine or duplicating machine?

A Yes. Yes. It is a flat board with a metal plate on top of it. When you turn that flat board over, it looks like a picture frame, and there are two guides attached to the metal plates. On one side, and on this side, for where you could push the paper in, the sheets in, and now that is the bottom part of the machine. The upper part is two rods, two metal rods with a couple of crossbars and springs, four springs, to which crossbars one can attach a cloth like a tablecloth which is smooth and varnished or some kind of a chemical on one side, and rough on the other side, so you can paint one side of it and the paint won't get through to the other side because you have that hard surface, that lacquered surface.

Now against that, that painting then you can put a stencil which was already processed, which has a text, and then

there is a clip, a metal clip with which you can fasten the stencil tight on the bottom part of that upper structure, and then you just lift it over on the paper where the sheets are, and with a roller you just roll over once and you have a perfect copy, a reproduction of the stencil, and it does a very neat, clean job.

Q Mr. Lautner, on the subject of radio communication, did you at any time report on that subject to the higher (tr. 394) echelon in the Communist Party?

A I had a number of conversations with Bill Norman about it.

Q Did you ever have a conversation with John Williamson with respect to—

A After that I never had a conversation with John Williamson.

Q Now, you mentioned finances previously, Mr. Lautner. What did you do with respect to finances and the program as projected by Thompson?

A Now that was Bill Norman and he told me to get a list of about twenty Party members. And he described what kind of a Party member. And I prepared such a list for him and I gave that list to him and he told me to get the list from Mae Miller or Mae Himoff and also for Bernie Chester. I didn't know that he instructed others to get lists, too, so there were three of us, with sixty names, some for the same purpose, so we decided that we will give all the sixty names to Bill Norman and let him select out of that sixty whatever name he wanted to for himself.

Also I want to state that neither Mae nor Bernie Chester knew exactly why Bill Norman asked them for a list of names.

Q Do you know why he asked you for a list?

A Yes, because I was on the initial meeting and I don't (tr. 395) know what conversations he had with them, and I didn't probe, what their list was about—but we decided to give him all the sixty names.

Q You previously described the purpose?

A Yes.

Q That came out of that meeting?

A Yes.

Q Mr. Lautner, with respect, you mentioned a test of the system. When was this conducted?

A This was conducted around May, 1949, or April, or May, 1949.

Q How was it carried out?

A It was carried out by a person that I had released from the Kings County Organization by the name of David Lead, or David Ameriglio, A-m-e-r-i-g-l-i-o. He prepared three sets of envelopes and we were letting the envelopes with the envelopes were given—I gave it to the Labor Secretary, Hal Simon, up here, and he was to let these envelopes come down, (pointed to chart), on first, in one area, and then the envelopes would be picked up again about a week later and see if there's any break somewhere along the line in the structure.

In the envelopes there was a sheet of paper, in each envelope there were—I don't know—twenty-seven envelopes prepared for each area, a sheet was in each envelope for each person who received the envelope, which was his, (tr. 396) comments like, Is he satisfied with the other two persons whom he or she may be integrated within that three? Well, that test, and there are, three different colors were

used, so that they would know one color down in this way; other color would go this way, and third, we would exactly know in that three that remark and by whom that remark was made.

Q Do you know what the results of the test was?

A I don't know. I don't know. I know the result of, in the Kings County, the judgment was after we had that check-up, that we—I am going to use Bill Norman's words, that we hit the bottom of the barrel too fast. We didn't integrate the right persons in some of the systems in that area and that certain steps had to be taken and this was as late as, already October, 1949.

Q Did Norman indicate that steps would be taken?

A Yes.

Q Do you know whether or not they were taken?

A I assumed they were, because by a month and a half or so later I was out of the Party.

MR. TAYLOR: I will move to strike that assumption; it is not evidence and not testimony.

MR. KEENEY: We will agree to strike that.

BY MR. KEENEY:

Q Mr. Lautner, in connection with the structure you have described, was anything done with respect to Com-
(tr. 397) munist Party literature?

MR. TAYLOR: What?

MR. KEENEY: Literature.

THE WITNESS: The only thing that I know of for

my own personal knowledge that the New York State Organization through Crosby at that time was making negotiations to buy a building on 17th or 18th Street, between 7th Avenue and 8th Avenue in New York, to use it as an underground place for stocking up literature, classic Marxist, classic literature.

BY MR. KEENEY:

Q By Marxist classics, literature, did you understand that he was referring to literature such as that we have?

A Yes, fundamental literature, that we shouldn't run out of it, or should be available.

Q Now, Mr. Lautner, getting back again to the, to this mimeograph or duplicating machine, did you have any further contact with that?

A With the duplicating machine?

Q Yes.

A Well, we manufactured them and we sold them to the areas.

Q All right. Directing your attention to 1949, did you have any contact with it?

(tr. 398) A Oh, well, I always had contact with the duplicating machine. It was always nearby, somewhere.

Q Well, did you have any particular contact with it?

A Well—

Q 1949?

A In relation to certain people; yes.

Q What was the nature of that?

A There was a plenum.

Q What is a plenum?

A The plenary session of the National Committee.

Q That was held?

A 1949. That was held in two floors below me in the Party Building, in the Hank Ford Auditorium in 35 East 12th Street, and District Organizers and State leaders were sent in to me. Some of them, one by one, that I should give them a demonstration of this little gadget, how practical it was.

Q Who told you you should give a demonstration?

A Jack Kling.

Q Who is Jack Kling?

A Treasurer of the Communist Party.

Q Who were some—

A And—

Q Who were some of the people that came in for demonstrations?

A As I recall one was Dorothy Healy, from California. (tr. 399) She's head of the Los Angeles District. Bernie Friedlander was one of them.

Q Where was Bernie Friedlander from if you know?

A He was the D.O. down here at that time, of the Carolinas, District Organizer. Eddie Stark came in from Chicago, the District Organizer. I don't know who—the name now—from Texas came in, and he asked me if he could get six machines like that. I say, "Sure, if you have the money." And Brooklyn paid for six machines, so I gave him six machines.

Q Brooklyn paid for six machines for Texas?

A For Texas; that's right, and other District Organizers came in during, in the course of the day, and I demonstrated the machine to them.

Q Mr. Lautner, do you know whether or not these in-

dividuals were sent in to you by someone?

A Jack Kling told me that he will send them in to me and I should sit down and discuss the thing with them. Otherwise I wouldn't.

Q Excuse me. When these people came in to your office, what, if anything, did you do?

A I just described that I demonstrated the machine to them. I showed the practicality of that little gadget, that you can take it apart, you can use it both, the bottom as a picture frame or a tray for a water pitcher, and you can take the other part apart or use it as a crocheting square, so (tr. 400) that you can disperse that little thing in an apartment and nobody would know that you have a mimeograph machine in the house.

Furthermore, it's a handy little gadget that is not bulky. There is no drum to it, and you don't have to keep it in the clothes closet and that it was a practical machine that will be used for the underground in the coming period for Party leaflet work, in the group systems.

* * *

(tr. 401) * * *

Q Mr. Lautner, the underground structure as you described it in the State of New York, do you know whether or not any part of that was put into operation on the National level while you were a member of the Party?

(tr. 401-A) A Yes, I do know.

Q How do you know?

A Well, the most vivid thing that stands out in my mind that I at one point in, on the 14th of January, I was extensively interrogated on the underground by persons who were not from New York. One was from Detroit. The other one was from Cleveland, and they had just as much knowledge about the underground as I had.

Q Were you—

MR. TAYLOR: Excuse me. Was that January 14, 19—

MR. KEENEY: '50.

THE WITNESS: June 14, on a Saturday evening, '50.

BY MR. KEENEY:

Q. Were any of these individuals in the National leadership of the Party?

A Yes.

Q What position, if you know, did Andrew Remes have in this structure?

A At the time I was in contact with him in 1949 in New York, I was doing work similar to the type of problems that I had, some of the problems that I had in New York City in 1944.

Q How do you know that?

(tr. 402) A John Williamson sent him to me and asked me to cooperate with him and get him in touch with certain people to solve certain problems. That was his assignment.

Q Now, Mr. Lautner, you mentioned a test of the structure on the one point. Was there prior to the time you left the Party, prior to the time you left the Party was there anything else in the way of a security test conducted?

A Well, yes. There was a test.

Q What was the nature of the test?

A The nature of the test was that—

Q First of all, did you participate in it?

A Yes.

Q What was the nature of it?

A In our setup on the State level the test was that one-third of the Party leadership was always out, out of office and out of contact with anybody in the Party, by instructions, for periods of one week and two weeks.

Q Was any reason given for this test?

A Yes.

Q By whom?

A Well, the person who was in charge of this phase of testing was Hal Simon, and the reason given was that the whole leadership, State leadership, shouldn't be in the office at all times. I mean, shouldn't be in the office together at any time.

* * *

(tr. 424) * * *

Q Mr. Lautner, during the time that you were a member of the Communist Party, were you taught concerning the ultimate goal of the Communist Party of the United States? Yes or no, please.

(tr. 425) A Yes.

Q When were you so taught?

A I was so taught in, specifically, in the 1930 National Training School and also in the 1941 National Training Schools.

Q By whom, sir?

A By a number of instructors, amongst others, Lustig, Szanto, Siskind, Carr, Sam Carr, as I recollect.

Q Now, Mr. Lautner, again I will ask you for a yes or no answer; while you were a member of the Communist

Party did you teach concerning the ultimate goal of the Communist Party of the United States?

A Yes, I did.

Q Where?

A Well, as late as in the 1947 and 1948 period in the classes where I taught.

Q. When you taught did you teach substantially the same on this subject as you were taught?

A Yes.

Q Now, will you tell us, what were you taught and what did you teach concerning the ultimate goal of the Communi. Party of the United States?

* * *

(tr. 426) * * *

THE WITNESS: That the ultimate goal, the ultimate aim of the Communist Party was to bring about a fundamental change in the economic, social and political structure of capitalism in the States.

BY MR. KEENEY:

Q As applied to the United States?

A As applied to the United States.

Q Mr. Lautner, were you taught as to how this fundamental change would be achieved? Yes or no?

A Yes.

Q When were you taught?

A In the 1930 and 1941 National Training Schools.

Q By whom?

A By the same persons that I named before.

(tr. 427) Q Did you yourself teach in the Communist Party as to how this fundamental change would be achieved?

A Yes.

Q When?

A In the, as late as in the 1947-48 period in the schools where I taught Marxism-Leninism.

Q What you did teach, was it substantially the same as had been taught to you?

A That's correct.

Q What were you taught and what did you teach as to how this fundamental change in the United States would be achieved?

* * *

THE WITNESS: That this fundamental change cannot be achieved peacefully. The United States is being the most powerful imperialist country, being the leader of the countries in the so-called imperialist camp, that this change will come and it can come as a result of force and violence on the part of wresting power from the capitalist class in this country.

BY MR. KEENEY:

(tr. 428) Q Mr. Lautner, again I ask you for a yes or no answer. Were you taught as to when the Party might achieve this goal in the United States?

A Yes.

Q Where were you so taught?

A In the 1930 and in the 1941 National Training Schools.

Q By whom?

A By the same persons that I mentioned before, and I

taught the same thing in the 1947-48 period in the classes where I was teaching Marxism-Leninism.

Q All right. Now, Mr. Lautner, what were you taught and what did you teach concerning when the Party would attain its goal here in the United States?

* * *

THE WITNESS: Yes, that there are certain prerequisite, preconditions objective and subjective, preconditions for a ripening revolutionary situation; the objective set of conditions, I described them, I think, yesterday, but I will go again—the crisis, a war situation, when the ruling class is unable to maintain itself through the state apparatus by ordinary means, by normal means, it has to resort to extra measures—when these sets of conditions exist parallel (tr. 429) with the subjective conditions, when the Communist Party is enjoying the confidence of the decisive sections of the working class and other strata of the working class of the—when the Communist Party enjoys the confidence of the allies of the working class, the poor farmers and national minorities; when the Communist Party is in a position to neutralize large sections of the Petty Bourgeoisie and the Bourgeoisie, when these two conditions exist, these two separate conditions, as the Party carrying out its vanguard rule is ready to lead the working class to wrest power from capitalism, and bring about that fundamental change in the social, political and economic structure of our society here.

BY MR. KEENEY:

Q Mr. Lautner, again I ask you for a yes or no answer. During the time you were a member of the Communist Party were you taught what party members should do in order

to achieve this goal of the Party, this ultimate goal of the Party?

A In, during my membership in the Communist Party, on all levels, the Party's membership were always urged to carry out their obligations, their day-to-day activities, their assignments in the day-to-day work of the Party in order to bring closer to realization of the final aims of the Party.

(tr. 430)

Q Did you teach that?

A That is correct. Not only teach that; I said it a millions of times.

Q When?

A In the course of twenty years on all levels where I gave leadership to the party membership.

* * *

## BARBARA HARTLE TESTIMONY

### DIRECT EXAMINATION

(tr. 480) * * *

Q Mrs. Hartle, was there a time when you became a member of the Communist Party?

A Yes.

Q When was that?

A It was in late 1933, or early 1934.

(tr. 484) * * *

Q Now did there come a time, Mrs. Hartle, when you received another assignment in the Communist Party?

A Yes.

(tr. 485) Q When was that?

A In 1935 I received the assignment to build a Railroad Branch of the Communist Party.

Q Who gave you this assignment?
A The section officials.

Q Will you explain what this assignment was to the jury, please.

A Building a Railroad Branch meant to have several Communist Party members be taken out of other branches and out of other work and assigned to be a branch among themselves for the purpose of concentrating on contacting and influencing and recruiting railroad workers into the Communist Party.

Q How long did you continue in this activity?
A About a year.

Q During this time did your education in Marxism-Leninism continue?
A Yes.

Q What was the next assignment which you had in the Communist Party?

A The next assignment was that to be the Agitation Propaganda Director of the Spokane Section.

Q How did you receive this assignment?
A I received that assignment from the section officials.

(tr. 486) Q Will you explain to the jury what an Agitation Propaganda Director was and what an Agitation Propaganda Director did.

A An Agitation Propaganda Director was usually called "Agit Prop" Director, is a title that was later known in the Communist Party as Educational Director. At a time when the Americanization of the terms took place in the Party. The work that was entailed by being an Agit Prop Director was to organize classes in schools, to see that Branch Educationals were held, and to supervise them, guarantee that the right kind of study was being taken up in the branches, to supervise the literature, distribution work

of the Party, to see that the necessary quotas of Party literature were distributed in the branches and on out to other persons in the industries, to supervise the issuing of leaflets by the Communist Party on important questions of the day; questions that they consider important.

Those were some of the duties.

Q Did you have any responsibility with regard to educational meetings in the various branches at that time?

A Yes. The Educational Director was responsible to see that the branches had proper Educationals, used the proper literature, and above all to make sure that they had them, make certain that they had Educationals at all times.

Q What were your responsibilities with respect to the (tr. 487) preparation of the leaflets?

A The responsibilities of the, as Agit Prop Director was at that time in the main to see, write them, to see that they were written, and that someone mimeographed them and that they were distributed.

Q What materials did you use in getting up these leaflets?

A The leaflets were based on the basic tenets or principles of Marxism-Leninism, depending on what situation you were bringing about, if you were bringing about a leaflet on peace, or an antiwar leaflet, you would use some material like War and the Second International, by Lenin, use a few quotes to show that what the real Marxist-Leninist meaning of this antiwar leaflet was, and their position was, and the same way on other subjects.

If you were writing on a strike struggle, or some other issue, you would find, base yourself on and find material in some of the Marxist-Leninist works to use in the leaflet.

Q By the way, how often would you get out the leaflets about this time?

A Quite frequently at that time. That was one of the major activities of the Communist Party in Spokane at that time, and a leaflet, were gotten out quite frequently, about once a week, an issue would go out, and then if a strike or (tr. 488) some other action took place that the Communist Party was interested in, they might go out every day or for a period of time.

Q Do you remember any particular actions in which the Communist Party was participating at that time?

A One of the actions that I can recall is a lumber strike that the Communist Party interested in itself at that time, and issued leaflets about.

Q I see.

Now did there come a time, Mrs. Hartle, when you went to a school in Seattle?

A Yes.

Q What was the approximate date of that assignment?

A 1937.

Q What was your position in the Party at that time?

A At that time I was either about to become or had recently become the manager of the Workers Book Store in Spokane.

Q Will you first tell the jury what the Workers Book Store in Spokane was?

A The Workers Book Store was the Communist-operated book store, had the title "Workers Book Store." It circulated Marxist-Leninist literature, the current pamphlets of the Communist Party and the papers of the Communist

Party, like the Daily Worker, New Masses, and things of that nature.

* * *

(tr. 489) * * *

Q What was the name of the school you attended in Seattle?

A It was called the Stalin School.

Q Will you tell the jury, please, how you happened to go to this school?

A When the Northwest District Communist Party Office let the Spokane Section know that they were organizing a full-time training school, the Communist Party Section Committee in consultation with the District Office selected me to attend that school.

Q Who paid your expenses to the school?

A The Communist Party.

Q Do you recall the approximate dates in the year 1937 when this school was held?

A No, I don't remember the months.

Q Do you recall who was in charge of this school?

A Yes. It was Morris Raport, R-a-p-o-r-t, who was the (tr. 490) District Organizer of the Northwest District of the Communist Party.

Q Who else was on the staff of the school, Mrs. Hartle?

A Harry Jackson, the Trade Union Director of the Northwest District of the Communist Party, also taught at the school. Another person who taught at the school was Roy Hudson, who was the National Trade Union Director of the Communist Party.

Q For how long did this school last, Mrs. Hartle?

A It lasted for six weeks.

Q And how many days a week?
A Six days a week.

* * *

Q Mrs. Hartle, will you, please, tell the jurors the sub-
(tr. 491) jects that were taught at the school, Stalin School of the Communist Party which was held in Seattle in the year 1937?

A The subjects taught there were Political Economy, the National and Negro Question, and Marxism-Leninism.

Q Do you recall whether there was a course on the trade union question?

A Yes, there was a course on the trade union question.

Q Do you recall some of the texts that were used at that school?

A Yes. Some of the texts used were The Communist Manifesto; Wage Labor and Capital by Karl Marx; Value, Price and Profit by Karl Marx; Imperialism by Lenin; Foundations of Leninism by Stalin; The Negro Question by James S. Allen, and those are some that I can recall at this moment.

* * *

(tr. 493) * * *

Q Now about the year 1937 were you, did you join any organizations on the instructions of your superiors in the Communist Party?

A Yes.

Q What instructions did you receive?

A The instructions that I received were that the Communist Party was interested in gaining influence in the Washington Commonwealth Federation, a left-wing Fed-

eration of Labor, political and other organizations, and that in order to gain this influence I, among others, should join and work in that organization.

The instructions were that we should devote a great deal of time to it because it was a very top priority project with the Communist Party and that it wished to direct and guide the work of this organization.

The other instructions I received were that the Communist Party had to strike deep roots in the labor movement, among the working classes, and I was told that inasmuch as my husband was a railroad worker, I was eligible to belong to the Women's Auxiliary of the Railway Workers Union and should join it, and that I should work from there to become a fraternal delegate to the Central Labor Council, which I did.

Q Mrs. Hartle, who gave you these instructions?

A The Communist Party officials in Spokane, Washington.

Q Specifically who?

(tr. 494) A J. H. Van Orman.

Q What was his position at the time?

A He was the Section Organizer of the Party at that time.

Q Did you join the Washington Commonwealth Federation?

A Yes, I did.

Q Did you come to hold office in that organization?

A Some offices I held of a neighborhood group of the Washington Commonwealth Federation.

* * *

Q Tell us what occurred within the organization as regards Communist penetration, Mrs. Hartle.

A What occurred in, putting it briefly is that from the (tr. 495) years 1937 on through to 1939 the Communist Party did a great deal of work in the Washington Commonwealth Federation, had almost all of its members belonging to it as a mass assignment.

In 1939 almost every officer of the at that time organization of the Washington Commonwealth Federation was a Communist.

Q Mrs. Hartle, did you, pursuant to your instructions, join the Women's Auxiliary of the Railway Carmen's Union?

A Yes, I did.

Q Did you, pursuant to your instructions by the Communist Party, get yourself elected a delegate from that union to the Central Labor Council in Spokane?

A Yes, I did succeed in becoming a delegate to the Central Labor Council.

Q Mrs. Hartle, what was your position in the year 1938 within the Communist Party?

A In 1938 I received the assignment and accepted it of being the Organizational Secretary of the Communist Party in Spokane.

Q As Organization Secretary what were your responsibilities?

A My responsibilities were to oversee the collection of dues from Communist Party members, to keep an accurate record of the membership of the Communist Party, to keep (tr. 496) a record of the new recruits as they were brought into the Communist Party, to lead the campaigns for rais-

ing funds for the Communist Party, such as, funds to raise money for the Daily Worker, or for the needs of the Spokane Section of the Communist Party, or for the fund drives of the Northwest District of the Communist Party.

Q Did you have any responsibility as regards assigning members to specific activities within the Party?

A Yes, the Organizational Secretary's duty was to check constantly to see that every member of the Communist Party was involved in at least one field of mass work, either trade union or the unemployed field, or some assignment where they'd be working with somebody besides among themselves, with non-Communists.

Q Do you recall whether there was a National Convention of the Communist Party in the year 1938?

A Yes, there was.

Q Were you a delegate to that convention?

A I was not a regularly elected delegate. I was an accredited visitor at the convention.

Q I take it that you attended the convention?

A Yes, I did.

* * *

(tr. 497) * * *

Q Now, Mrs. Hartle, at this time, in 1938, what was your relative position in this Spokane Section of the Communist Party in the State of Washington?

A In the State, in the Spokane Communist Party, the position of Organizational Secretary was that of the second in command or the second topmost position.

Q And over what geographic area did your authority extend?

A Over the area of Spokane, and its environs, which included some smaller towns within a radius of a hundred or a hundred and fifty miles.

Q Did there come a time, Mrs. Hartle, when you took a leave of absence from the Party?
(tr. 498) A Yes.

Q When was that?
A In 1939. As I recall it was in the spring or early summer of 1939.

Q When did this leave of absence terminate?
A In 1940.

Q What happened at that time?
A At that time I became the Organizer of the Spokane Section of the Communist Party.

Q Was that the top position in the Spokane Section of the Party?
A Yes.

Q What was the territorial jurisdiction of the Section while you were Organizer; that is, while you were Chairman?

A While I was Chairman of the Spokane Section at that time, the jurisdiction was Eastern Washington. After a few months of being Chairman of the Spokane Section a change was made. Idaho was added to that Section. The name of the position changed to that of Inland Empire Council Chairman of the Communist Party.

Q Mrs. Hartle, how long did you continue as Chairman of the Inland Empire Council of the Communist Party?
A Until June of 1942.

Q Now, Mrs. Hartle, directing your attention to the

classes which you attended at the Stalin School in Seattle (tr. 499) in 1937, will you answer the following questions yes or no?

Were you taught there the ideology and the principles of Marxism-Leninism?

A Yes.

MR. TAYLOR: Mr. Woerheide, I ask that, as regards these questions, we have specification in the question to who taught.

BY MR. WOERHEIDE:

Q Mrs. Hartle, who taught the principles of Marxism-Leninism to you?

A All of the instructors taught some of them.

Q Were you taught regarding the application of these principles of Marxism-Leninism to the United States?

A Yes.

Q Were you taught that such a principle did apply to the United States?

A Yes.

Q Were you taught regarding action which should be taken by members of the Communist Party to put these principles into effect?

A Yes.

Q Now, Mrs. Hartle, thereafter in your, in performing your duties as a functionary of the Party, did you by action put into effect the principles of Marxism-Leninism?

A Yes.

(tr. 500) Q Did there come a time, Mrs. Hartle, when you ceased to be Chairman of the Inland Empire Council of the Communist Party in Spokane?

A Yes.

Q And went on to another assignment?

A Yes.

Q When was that?

A That was in June of 1942.

Q What was your next assignment?

A My next assignment was that of being the Administrative Secretary of the King County Communist Party.

Q Where were the headquarters of the King County Communist Party?

A In Seattle, Washington.

Q How did you receive this assignment?

A I received that assignment through a visit of Andrew Remes, and Phil Frankfeld, who came to Spokane to a conference that the Inland Empire Council was having. Upon hearing my report to the conference Phil Frankfeld said that he was very much impressed with the report and he wished to propose that I should come to Seattle and work in the District Office of the Northwest District Office of the Party.

Q Did you do so?

A Yes.

Q What was your assignment in the Northwest District (tr. 501) Office?

A My first assignment there was to become acquainted with the whole operation and organization and personnel of the Party and therefore I went to very many meetings of

many committees and commissions and Party Organizations, in order to become acquainted.

My first assignment, specific assignment, was that of Secretary of the King County Communist Party.

Q I take it the King County Communist Party is a subsidiary organization of the Northwest District of the Communist Party?

A Yes, it was subsidiary organization.

Q Was there a District Board in the Northwest District?

A Yes.

Q Was there also a District Committee in the Northwest District?

A Yes.

Q Did there come a time when you were appointed to positions on the District Board in the District Committee?

A Yes, in 1942, after I was transferred to Seattle, I became a member of both of those bodies.

Q Will you explain to the jury, please, what area was under the jurisdiction of the Northwest District Board and the Northwest District Committee.

(tr. 502) A At that time the Northwest District of the Communist Party had as its territory the State of Washington, Oregon, Idaho. That is it.

Q Mrs. Hartle, how long did you continue to hold the positions of member of the Northwest District Board and member of the Northwest District Committee?

A From 1942, at which time I came to Seattle, until 1950, at which time I left Seattle.

Q Mrs. Hartle, was there a so-called Northwest Negro Commission, which was a part of the Party Organization

in the Northwest District?

A Yes.

Q Did you have any connection with that commission?

A Yes. In 1942 I was appointed to that commission by Phil Frankfeld. I remained on that commission until 1950. During several of the early years, of my membership on that commission, I was its Secretary, and during 1947 to 1950 I was the Chairman of the Commission.

Q Mrs. Hartle, as a—was there a school maintained by the Communist Party in Seattle?

A Yes.

Q What was the name of this school?

A It was the Workers School.

Q Did you have any connection with the Workers School?

A Yes, I was a teacher in the Workers School.

(tr. 503) Q When did you start teaching there?

A I taught in a session of the Workers School in 1942, the first time.

Q Thereafter, in what years did you teach?

A I taught in the years 1943 and 1944.

Q Do you recall who was in charge of that school?

A For most of the time, if not at the very beginning, a man by the name of John Dachbach was in charge of the school. D-a-c-h-b-a-c-h.

Q Did you know John Dachbach as a functionary of the Communist Party?

A Yes, I knew him as a member of the District Committee of the Communist Party for a number of years between 1942 and 1950.

Q Was there also a man named Phil Frankfeld connected with the school?

A Yes, he was a teacher in the school. He taught the leading class in the school for Communist Party Functionaries.

Q What was his connection with the Communist Party, if you know?

A He was the District Organizer of the Northwest District of the Communist Party in the 1942-43 period.

Q Do you know what his later assignments in the Communist Party were?

A It was reported in the Communist Party that later he (tr. 504) became the Chairman of the Communist Party of Maryland.

Q Mrs. Hartle, what course or courses did you teach in the Seattle Workers School?

A I taught several courses on Political Economy. I taught several courses on Leadership Training for Communist Party Functionaries.

Q Did you also attend courses in the school?

A Yes. I attended the course of Phil Frankfeld for Communist Party Functionaries.

Q What was the name of the course which he taught?

A It was Marxism-Leninism.

Q Now, Mrs. Hartle, the subject that you taught, Political Economy, was that subject a part of the Marxist-Leninist theory?

A Yes.

Q Mrs. Hartle, in the course that Phil Frankfeld taught, did he teach you regarding the application of the principles of Marxism-Leninism to conditions inside the United

States? Will you answer that question yes or no?

A Yes, he did.

Q Did he teach you that the principles of Marxism-Leninism did apply in the United States?

A Yes, he certainly did. * * *

(tr. 554) * * *

Q Will you tell us what happened when you and the other students arrived at this school.

A Yes, when we arrived at the school Jacob Mindel made an introductory statement to the school, that it had a two-fold purpose. One of the purposes was to train theoreticians and propagandists for the Communist Party. The other purpose was that in the study of Marxism-Leninism we would search out and expose the remnant of revisionism, and how the revisionism had crept into the Communist Party during the Browder era.

Q In this talk did he make any reference to the terms theory and practice?

A Yes.

Q What did he say?

A He made the opening statement that Marxism-Leninism is a science, that it is not a general science, but the partisan science, the science of the working class, the science of a particular class. He said that it is a partisan theory. He said that the theory of Marxism-Leninism was founded by Marx, Engels, Lenin and Stalin, that these were the great theoreticians of the movement and that the persons were important as well as the theory, that we should popularize and explain the people and their struggles in the revolutionary movement as well as their theories, when we were talking about Marxist-Leninist theory, and he said that (tr. 555) Marxist-Leninist theory is a combination of

theory and practice, that, in the first place, Marxist-Leninist theory doesn't start from theory or from an idea, but it starts from facts, it starts from an analyses of the struggle. It draws general conclusions from the struggle and gives direction for the further conduct of the struggle and in the further conduct of the struggle new theory is again involved.

Q Mrs. Hartle, did you take a course called dialectical and historical materialism?

A Yes, I did.

Q Who taught that course?

A Jacob Mindel.

Q In substance what did he teach you during this course?

A In substance in that course we were taught first of all what the word dialectical means. We were taught that the word dialectical means the method of understanding or comprehending nature, the dialectic is the method of this philosophy, and one of the things that we were taught is that the brain is the organ of thought.

We were taught that the word historical, when you use the term historical materialism, that you're applying dialectical materialism to the life of society. You're using this dialectical materialist philosophy, a general philosophy, but you are applying it to the study of society and not nature. (tr. 556) as you might otherwise.

We were taught further in that class that inasmuch as everything according to this theory is in constant conflict, that there is a theory of opposites in society as well as in nature, a positive and negative, a struggle between two things; that in nature this struggle takes place, in society this struggle takes place between classes, the capitalist class

and working class in the stage of capitalism, and we were taught in this course and reference was made to a quotation in Chapter 4 of the History of the Comm nist Party of the Soviet Union that it is the duty of a revolutionary not to try to gloss over this class struggle or try to compromise it, but to unravel it, to allow this class struggle and help this class struggle to unfold, the clash to proceed.

Q In this connection was anything said with respect to revolution and reform?

A Yes. It was further said in this connection that it is the duty of a Marxist-Leninist to be a revolutionary and not a reformist.

* * *

(tr. 557) * * *

Q Was anything said about the uses of ideology?

A Yes, it was said that ideology is an important factor and that by it, to the revolutionary movement, it is a weapon; theory is a weapon.

Q A weapon for what purpose, Mrs. Hartle?

A For the pursuit of the aims of the Communist movement. The general aim of socialism and the particular aim of the dictatorship of the Proletariat, the Proletarian revolution.

Q Was anything said in this course about fronts and in the class struggle, Mrs. Hartle?

A Yes, it was said in this course that the theoretical front, the front of ideas and theory is also a front of struggle that the class struggle takes place in the sphere of theory (tr. 558) as well as in the sphere of economics and politics between the classes.

It was said that there are only two theories in a capitalist country, two bodies of theory, the working class theory and the capitalist class theory, and there is no in-between theory or ideology. There is no middle-of-the-road theory, that all middle-of-the-road theories are capitalist theories with variations.

Q How was the term struggle used in this course, Mrs. Hartle?

A The term struggle in the theory course was used as explaining the conflicts or disagreement that takes place in the field of theory.

Q Was anything said about a struggle against revisionism?

A We were taught in the school that the struggle against revisionism is a struggle in the field of theory.

Q Was anything said about the spontaneous, about spontaneous struggle?

A Yes, it was said that the spontaneous struggle of the working class will never lead to socialism or never prepare for the necessary steps to get to socialism, such as, the seizure of power and the retaining of power through the dictatorship of the Proletariat, that the spontaneous day-to-day struggles of the working class in the trade unions, their economic struggles, their activity on labor (tr. 559) legislation and all of these things would never lead any place. They are just a struggle within the confines of capitalism and capitalism will last forever and that class struggle can go on forever if there isn't a leadership and a theory in the working class to find a way out of that kind of a situation.

Q Was any theory pointed out as the theory that would lead out of this type of situation?

A Yes, the theory of Marxism-Leninism. It was also known as the theory of the Proletarian revolution.

Q Was anything said about the Communist Party as a collective entity, a collective individual?

A Yes, it was said that the Communist Party is a collective individual, that the Communist Party is monolithic, meaning by that that it's not made up of a loose federation of organization or loosely organized individual, but that the Communist Party is a collective individual.

Q Was anything said about what the Communist Party relies on in its work?

A Well, it was said that the Communist Party relies on the theory of Marxism-Leninism to guide its work.

Q Mrs. Hartle, did you have a course at this school called Political Economy?

A Yes.

Q Who taught that course?

(tr 560) A Jacob Mindel.

Q Will you tell the jury, please, the substance of what you were taught in that particular course?

A We were taught that Political Economy was a science. We were taught that in capitalism, under capitalism society is divided into two main classes.

Q What are these two main classes?

A The Bourgeoisie, or capitalist class. The other being the Proletariat working class; that there are two main classes in capitalist society, that the other classes, and there are middle classes that exist, are not of a determining nature in history, that they vacillate between the capitalist class and the working class. Sometimes there is one side sometimes with the other; that they waver back and forth

and will never play a role in history in determining anything new or determining the destiny of the country, or the world, for that part.

These two main contending classes, and they are contending, that is another thing that we were taught, are in constant struggle. The class struggle exists, whether Marxist-Leninists are here or not. That is what the Commun— that is what the school taught, that these two main classes are here and these two main classes are in struggle, and it was taught us that the class struggle was recognized by all forms of Socialists and by many liberal Bourgeois persons.

That was what they taught us, that the class struggle, as such, is recognized as existing by all forms of Socialist theory and by many Bourgeois liberal theoreticians.

* * *

(tr. 566) * * *

Q Were you told in this course at what stage of development the United States was at that time?

(tr. 567) A Yes, I was taught that the United States was an imperialist country and was in fact the foremost imperialist country in the world today.

Q In this course was reference made to the contradictions of capitalism?

A Yes. The three basic contradictions were taught us in this course as well. The main contradiction is between capitalists and working class, between the capitalists, the imperialist powers and the colonial nations, and among the imperialist powers themselves.

I was taught in this course that these contradictions

make imperialism the eve of the Proletarian revolution, the era of Proletarian revolutions, and that was the definition of imperialism, the era of Proletarian revolutions.

Q Was anything said, Mrs. Hartle, about the readiness of the United States for revolution and for socialism?

A Yes. It was said that inasmuch as imperialism is the era of Proletarian revolutions and inasmuch as this period began with the turn of the century, that the United States objectively along with all the rest of capitalism in the world was objectively at the stage for Proletarian revolution, that it also was a part of this general situation.

Q This phrase "objectively ready," will you explain that, please, to the jury?

A In the Marxist-Leninist theory those terms "subjec-
(tr. 568) tive" and "objective" are used to describe two sets of conditions.

The objective conditions are the conditions that the Communist Party does not control. It means the historical situation. It is whether you are in the stage of imperialism or feudalism or what the international situation is, or situation in the country. The things that happen in history that are not controlled or influenced by the Communist Party.

The subjective conditions are the Communist Party and what it can influence and its influence like the state of mind of the working class is a subjective factor, if that factor arises from the Communist Party.

So that the objective conditions are the situation that obtain. The subjective conditions is the state of the Communist Party.

Q Were you taught anything with respect to wars and

economic depressions as—

A Yes.

Q —part of the objective conditions?

A Well, I was taught that there are objective and subjective conditions in a revolutionary situation as well. There are general objective and subjective conditions. The general objective condition I mentioned here was the era of imperialism. The subjective condition, of course, is the Communist Party and the class conscious, the working (tr. 569) classes, but in a revolutionary situation there are also objective and subjective conditions of a revolutionary situation, and I was taught that a revolutionary situation is a deep crisis, economic and political. It is a situation in which the old ruling class has plenty of economic and political difficulties and such a situation could be a very bad time in a war, a partial defeat, or defeat in a war, that can be a revolutionary situation.

It can be a very deep economic crisis in which there is a great deal of discontent in the country, and that can be a revolutionary situation, and 1933 in our country it was described in this course as being such a revolutionary situation in the United States.

Q Objectively speaking?

A Yes, objectively speaking, that had objective and subjective conditions. The objective conditions of the revolutionary situation in 1933 was that the country was in a bad economic state. The crisis was very deep, and the people were in motion, discontented or alarmed, not knowing just what to do or which way to turn, or so on, at least in a state of doubt.

The subjective condition was the Communist Party, and

it was pointed out that in 1933 the Communist Party in this country was not subjectively ready to give the necessary leadership to lead to the seizure of power and the dic-
(tr. 570) tatorship of the Proletariat, wasn't large enough, didn't have enough influence in the working classes.

* * *

(tr. 571) * * *

Q Mrs. Hartle, was any reference made to the preaching of socialism and concrete struggle?

A Yes, we taught in the class that when the struggle is led by a revolutionary party, the Communist Party, every struggle is a struggle for socialism, that the struggle for immediate demand is the struggle for socialism, that we were asked the question, What then becomes of the struggle for socialism, and Jacob Mindel told us that there is no struggle for socialism, as such; you don't go out to the barricade and fight for socialism, that the workers are not led that way.

He explained to us that when the working class is ready to follow the Communist Party, that is, when it is possible to establish, to seize power and establish the dictatorship of the Proletariat, that the working class doesn't necessarily know, or the majority of them need to know that they are fighting for socialism. What they have to do is to be ready to follow the Communist Party in the battle against capitalist class.

Q Well, what was said as to what the members of the
(tr. 572) Party and the officials of the Party must do in order to get the members of the Proletariat to follow the leadership of the Communist Party?

A They said that the Communist Party and the mem-

bers of the Communist Party must go out among the workers and the masses and participate in their struggle and gain leadership in the struggles and work from day to day to gain the confidence of the working class and the masses and that that was the necessary day-to-day work of the Communist Party that had to be done.

Q Was anything said about opportunism, Mrs. Hartle?

A Yes. We were taught that opportunism is the word in Marxism-Leninism for betrayal of the working class and opportunism was, and the way you could betray the working class was to put the interest of one section of the Proletariat above that of another section of the Proletariat, like put the interest of the working class of the United States above the interest of the working class of the world. That would be one way that you would betray the working class as a whole.

Q What was—

A Or to allow a conflict of interest in the working class.

Q Was the term reformism used?

A Yes.

Q When were you taught—

(tr. 573) A We were taught in Political Economy that there are two types of reformism or reforms. There is a revolutionary reform. A revolutionary reform is some gain like a wage increase that is gained in struggle, such as, a strike, or lots of shop militant activity. That is a revolutionary reform. A gain that is made in struggle involving the masses.

And there is also a reformist reform. That is a gain that is made without struggle, a wage increase that the workers get without having to put up a struggle, that the business agents dicker about over the table and get the results with-

out having a strike and a lot of fury about it.

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(tr. 575) * * *

Q Mrs. Hartle, did you attend a course entitled The State?

A Yes, I did.

Q Who taught this course?

A Walter Neff.

Q What was the substance of the teaching which you received in that course?

A We were taught in that course, in the first place, that it was a very difficult idea to grasp the theory of the state, that it was not an easy concept to learn, the Marxist-Leninist idea of the state, and we were taught that Lenin had similarly taught that this was not an easy concept to grasp, and we were referred to a lecture that Lenin made at Sverdlof University in Moscow, in 1919, in which he said the same thing, that the subject was difficult to grasp.

We were taught that the state is an instrument of oppression of one class over another, that this instrument of oppression consists of bodies of men, such as, armies, police, and prison officialdom, and that a part of that apparatus, of course, is the buildings and arms that are used by these persons, that is, the force; the basic instrument of oppression is the force that is used by whatever class has the state in its power, so that the state was taught to be an instrument of oppression of one class over another.

(tr. 576) We were taught that—

Q I take it that is an instrument of forceful oppression?

A Force, I believe oppression, that is, the arms and the prisons. They are instruments of force. They are not administrative.

We were taught that the ancient slave society had a state of slave owners, that the slave owners ran the state in ancient slave society, and that in feudalism, the feudal barons and landowners controlled the state, vas a feudal state, and that under capitalism, the capitalist state is a state of the capitalist class.

These are class states, a state belongs to one class or another, and whichever class has the state, uses it to oppress the other class in the class struggle. We were taught that the capitalist state is not always in the same form, that there are various forms of capitalist state, that the capitalist state can be in the form of a Fascist government which is an open brutal, tyrannous dictatorship of the capitalist class through their state, but that it can be a Bourgeois democratic state, Bourgeois republic, that the capitalist class can wield the state veiled in a democratic form, have some democratic rights, some rights to vote, some rights for labor unions, and free speech, but that, nevertheless, this is still the capitalist state.

It is the, it has the means of forcibly suppressing and does (tr. 577) suppress the working class and the people generally.

Q Was anything said regarding the form of government in the United States?

A It was said that the Bourgeois state of our country, which is a Bourgeois country and has a Bourgeois state or capitalist state, whichever term you happen to use, that the

capitalist state of our country is a Bourgeois republic. It is a form of a Bourgeois republic, that the Government of the United States of America is a Bourgeois republic, and is a form of dictatorship of the capitalist class.

Q Now was anything said about the theory of the state which you have just explained, as the basis of the theory of the Proletarian revolution?

A We were taught that the theory of the state is the, is the basis of the theory of the Proletarian revolution. We were taught that it is impossible to understand who is ruling and how to supplant that rule without understanding what a state is. You have to understand what a state is, and what particular type of state you are confronted with before you can understand the theory of the Proletarian revolution and apply it, because you wouldn't know what you were trying to do, overthrow the state.

Q Was anything said as to what should be done with respect to the state?

A It was said that the Bourgeois state must be forcibly (tr. 578) overthrown by the working class led by the Communist Party. And it was further said that the struggles and activities of the Communist Party prepare the working class for this act of seizure of power.

Q In this connection was any reference made to dictatorship of the Proletariat?

A Yes. It was said that the Bourgeois state machine is not smashed after the seizure of power, but in the course of seizing power that the armies, the police, the prisons have to be dealt with and smashed up and rendered inoperative in the course of the seizure of power, that other matters, that some other matters in replacing the, a state, such as the, some of the administrative apparatus and

some other matters would take a longer period of time, but the forcible elements of the capitalist state must be smashed in the course of taking power, but some other things like reorganizing the banking system, or some matters like that, could be done in a somewhat longer process.

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(tr. 585) * * *

Q Mrs. Hartle, did you study a course called Struggle for Democracy?

A Yes.

Q Who taught that course?

A Jacob Mindel.

Q Will you tell the jurors, please, the substance of what you were taught in that course?

A I was taught in that course the basic concept, basic principle of that course is that the struggle for democracy is a struggle for socialism.

Q Were you given a general law of revolution in that course?

A That I don't recall.

Q Was there any explanation given you regarding the relationship between democracy and the class struggle?

A We were taught that to struggle for democracy was important in the pursuit of the class struggle to make possible the freedom and the avenues to organize and educate and teach the working class for organization, you needed the right to organize, and the ability to bring large federations of labor together, and to get the working classes as closely united together as you could. To educate (tr. 586) the working class, you needed to have the opportunity to put out papers and pamphlets and send speakers

and a lot of resolutions and a lot of material like that, and to train and steel the working class, was to lead them in struggles like strikes and demonstrations and all kinds of working class solidarity actions, and to teach them in the course of these fights who their main enemy is, who the enemy is, the American imperialist.

Q Was any comparison made between Social Democratic struggle for democracy and Communist struggle for democracy?

A Well, it was said that the Social Democrats, the Socialist is, that is, those of the Second International struggled for democracy per se, just for democracy's sake, that they struggled for democratic rights and democracy because they thought it was a good thing, it is a fine thing to have.

The Communist struggle for democracy is to make possible the possibilities to, probabilities to lead the working class to power, and after the seizure of power, to establish Proletarian democracy which is democracy for the first class, the way it was defined for the working class, and against the capitalist class.

Q Were you taught what education for socialism means to a revolutionary?

A Yes, I was taught that the Communists' concept of (tr. 587) education is not that you can teach the masses through books. We were taught that the masses, the classes and the masses don't learn through books, they learn through struggle and activities.

We were taught that the whole history of mankind proved that the masses in the huge majority don't learn through books or that type of learning, but that they learn through activities and struggle, the class struggle that has

taken place under every form of society.

Q Were you taught as to the form of struggle that educates the masses, Mrs. Hartle?

A Yes, the forms of struggle that educate the masses in the first place are the class struggles of the workers against the bosses, that the trade unions were described as schools for communism, and that is the very important education of the masses, through struggle, and specifically the working class, but that the working class and other people learn through such struggles as election campaigns, fights on lowering rents and lowering, controlling prices, or working for school programs, and a whole host of issues that somebody happens to be interested in at the time, the G.I. Bill of Rights, against Military, Universal Military Training, whatever the issue might be, Negro rights of various kinds, and that if the Communists get in there and lead those struggles in the Communist way, that the workers and (tr. 588) masses will learn from those struggles how to fight, how to unite, how to mobilize their forces, and will learn to recognize who the enemy is, American imperialism.

Q What were you taught as regards such struggles bringing about a revolutionary situation?

A Well, I was taught that these struggles themselves, these struggles themselves, at least, as far as the Communist Party is concerned, are not the key factor in bringing about the situation.

The revolutionary situation is brought about, the Communist Party said, by the very inevitable development of the contradictions of capitalism, the class struggle, the struggles on an imperialist scale and the colonial struggles, but that the role that the Communist Party plays and these struggles played, is preparing the workers and the

people to be ready to be able to take power, to know how to take power when such a situation does arrive.

Q Now at the time that such a situation does arise, what would be the plan and program of the Party?

A Well, the plan and program of the Party would be to lead the working class to seize power, to smash the Bourgeois state machine, establish the dictatorship of the working class or the Proletariat, and then to proceed to reorganize all industry on a Socialist basis.

Q In this course, this Struggle for Democracy, did your (tr. 589) instructor explain why the Bolsheviks were able to take power in Russia?

A Yes.

Q What did he say in that respect?

A He said that it was possible and relatively easy for the Bolsheviks to take power in Russia because of a number of subjective and objective conditions. The objective conditions were that there was a serious situation in the country as the result of the war, World War I, that the imperialist powers, the other imperialist powers were embroiled in this war and so busy with that that they didn't have the time and ability to put down this revolution and that some other situations obtained, objective situations, that made it relatively easy for the working class to take power there.

On the subjective conditions he said that the Bolsheviks were a trained, steeled and tested party, that they had gone through two revolutions. I don't recall the first one that he mentioned, but he did mention—oh, yes, I do—he mentioned the Revolution of 1905 and the February Revolution of 1917 as being rehearsals for the October Revolution.

Q Did he draw any lessons for the Communist Party in the United States from the experience of the Bolsheviks?

A Yes. The lessons that he drew and that we were to pass on, and he told us that, too, that it was necessary for the Communist Party to build, to train itself theoretically (tr. 590) and to participate in the struggles of the working class and the masses in order to fulfill the conditions of a Bolshevized party, a party of the new type.

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(tr. 590) * * *

Q Mrs. Hartle, did you have a course called Struggle for Peace?

A Yes.

Q Who was the teacher of that course?

A Jacob Mindel.

Q Will you tell us as you best recall the substance of (tr. 591) the teaching of that course?

A The teaching in that course was, although it was called the Struggle for Peace, in the class that we started with defining was war—

Q How was war defined for you, Mrs. Hartle?

A It was defined as being a continuation of politics by other, that is, forcible means. It was explained to us that wars are not accidental, that they just don't crop out here and there because somebody shoots somebody in Serbia but that wars, the groundwork for wars is laid, they are waged by classes, they are waged in class interest, and they are continuations of the politics preceding the war, and the peace that follows a war is a continuation of the politics of the war.

In other words, there is no, we were taught there is no big cleavage between what happens before a war and during a war and after a war, that the class relationships and class struggle have to be seen, and we were told that war is the class struggle on an international scene.

We were further taught that Communists are not pessimists who are against all war, but that Communists and Marxism-Leninism differentiate between times of wars. There are just wars and unjust wars. Unjust wars are wars for conquest, for aggrandizement. Just wars are wars of liberation, independence, for freedom, and the struggle (tr. 592) of the Proletariat in a civil war, when it is attempting to gain power, is a just war.

Q Do I understand, Mrs. Hartle, that under Communist theory wars have a class nature like politics?

A Yes.

Q And does this class nature determine whether or not a war is a just war or an unjust war?

MR. TAYLOR: Are those questions directed to what was taught in the class, Mr. Woerheide?

MR. WOERHEIDE: Yes, they are.

THE WITNESS: Yes. We were taught that the character of a war is determined by the classes who wage it, and in what interest the war is being waged.

A colonial people that is waging a war to gain its freedom from an imperialist power is waging a just war. A capitalist nation like ourselves, which is waging a war to conquer foreign markets, raw resources and material, is waging an imperialist and unjust war.

We were further taught that a Socialist nation is not

imperialist, has no need or desire to encroach on anyone else's territory and is, that it is impossible for it to wage an unjust war.

(tr. 593) BY MR. WOERHEIDE:

Q Were you taught as to how all possibility of war could be abolished?

A Yes. We were taught that capitalism and imperialism inevitably tend towards war. We were taught that war can be delayed or stopped with peace campaigns, but we were taught that capitalism, and especially capitalism in the imperialist stage, tends towards imperialist wars because of the competition among the imperialist powers, and that by the working class and the Communist movement gaining domination of the whole world and establishing socialism, that the driving motive for a war would be eliminated and there would be no more wars.

Q Were you taught that whether or not it was important as to who launched the initial attack to whether a war was just or unjust?

A No. Yes. We were taught that who took the first step has nothing to do with the character of the war. Long arguments in history about who shot the first shell don't determine the fundamental analyses of whether a war is correct or just or unjust. It is a matter of the forces, the class interest and what it is waged for.

If it is the working class waging a war for liberation, it is just. If it is the capitalist class waging a war for conquests, it is unjust.

(tr. 594) Q Were you taught as to how wars started by a capitalist government can be ended?

A We were taught that imperialist war started by an imperialist government or capitalist government in this stage of history can only be ended by the civil war of the workers against their own government.

Q In such a situation who supports the old regime?
A The army.

Q And who fights against the old regime?
A The army of armed workers.

Q And what were you taught as to who leads the armed workers?

A I was taught that the Communist Party leads the armed workers.

Q And what were you taught as to what the Communist Party is with respect to these armed workers?

A Well, I was taught that it was the vanguard of the working class, the general staff of the working class, the leader of the working class, and, therefore, of those armed forces as well.

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(tr. 595) * * *

Q Mrs. Hartle, was there taught in the course, the Struggle for Peace, in the National Training School which you attended in 1946, a slogan used by the Bolsheviks in 1917?

A Yes, there was. The slogan was "Turn the imperialist war into civil war."

Q Do you recall a slogan about, that is, some teaching of a slogan about the duty of defeating one's own government?

A Yes. The slogan that was taught in that respect was that

it was the duty of the revolutionaries to lead the working class to defeat one's own government, an imperialist gov-
(tr. 596) ernment rather than supporting that government, by supporting the war and voting war credits and doing some other things like that. We were taught that that is the way the Second International did, the Socialist International, which was also called the Yellow International.

Q Mrs. Hartle, I read you a passage from Government's Exhibit 17, a letter to American Workers, by V. I. Lenin, and I ask you if there was any teaching with respect to this passage in the course entitled the Struggle for Peace:

He is no Socialist—

MR. TAYLOR: What page, Mr. Woerheide, please?

MR. WOERHEIDE: This is page 12.

He is no Socialist who does not understand that one cannot and must not hesitate to make even such a sacrifice and the sacrifice of a piece of territory, the sacrifice of a heavy defeat at the hands of capitalists of other countries, the sacrifice of indemnities to capitalists in the interest of victory over the Bourgeoisie, in the interest of transfer of power to the working class, in the interest of the beginning of the International Proletarian Revolution. He is no Socialist who has not shown by deed his readiness for the greater sacrifices on the part of his fatherland so that
(tr. 597) the cause of the Socialist Revolution may be pushed forward.

BY MR. WOERHEIDE:

Q Was there—

A Yes, we studied that quote in the class.

Q You studied that quotation. Was that quotation explained to you in this course?

A Yes, it was explained, that what was at stake in an imperialist war as far as the working class and the Communist Party was concerned was not what the capitalist had to lose. That was not what was at stake. What was at stake was what the working class had to gain, and we were taught that the Socialists of Europe in World War I were interested in helping their capitalist government save their colonies and make sure that they came out well in the war, whereas, and we were taught that it was the duty of Communists and revolutionaries not to worry about that, what the capitalists lose in a war, colonies or whatever, but to worry about defeating the capitalist imperialist government and setting up the workers government.

Q Were you taught as to whether or not there is such a thing as Soviet imperialism?

A We were taught that there is no such thing as Soviet imperialism, that this, we were further taught, that this is a lie that was invened in the first place by the Trotskyites (tr. 598) who are the theoreticians of the counter-revolution.

Q Was there any discussion regarding possible intervention by the Red Army of the Soviet Union where there is a struggle going on outside of its territory?

A Yes, there was discussion on that point. We were taught that whether the Red Army intervenes or not is not a matter of principle. It is a matter of tactics, the feasibility

for the benefit of the whole Communist movement, whether it should be done or not.

We were taught that it is not precluded, that the Red Army may not at some juncture intervene in a class struggle, battle, and that as a matter of principle if the situation warranted, if it would help the Communist movement on a world scale more to intervene than not to intervene, they would be justified in intervening.

Q Was there any reference that you recall was made with respect to Browder and the Tehran Agreement?

A Yes. There was a reference made that Browder, when he was giving leadership to the Communist Party in the United States, was using the Tehran Agreement as a starting point of analyzing the world situation, that this was an error on his part, that he should have started with the capitalist system as the starting point of his analyses of the situation in the world.

If he had done that, he would not have made the revision-
(tr. 599) ist and opportunist errors that he made.

Q Were you taught regarding whether or not the interests of the working class of America coincides with those of the Soviet Union?

A Yes, we were. We were taught that the interests of the working class of our country, in fact, of the working class of every country of the world, coincide with those of the Soviet Union, that the Soviet Union is the first country in the world in which the working class has taken power. It is a workers state, and as such, it is the fatherland of the working class of the world.

* * *

(tr. 601) * * *

Q Mrs. Hartle, were you taught a course at the National Training School in 1946 that was called The Party?

A Yes.

Q Who was the teacher of that course?

A Mary Himoff, H-i-m-o-f-f.

Q What were you taught regarding the Marxist concept of a party?

A I was taught that a party is the representative of a class, that a political party represents class interest.

Q Were you taught as to whether or not this is a fact that was concealed in the United States.

A Yes. We were taught that this fact is concealed in the United States by the two-party system, that in the United States the two-party system of capitalism conceals the fact that both parties are representing the same class, the capitalist class, and that as far as Marxism-Leninism is concerned, they are tweedledum and tweedledee.

Q Was there any teaching in this course regarding the revisionism of the Second International?

A Yes.

Q What was that?

A We were taught that the Second International had taken the revolutionary heart out of Marxism, the revolutionary core, and that although the Socialist Party of the (tr. 602) Second International were a large mass party, they had missed on the theory of the Proletarian dictatorship and the theory of the Proletarian revolution.

Q Were you taught as to the main reason why the working class needs a party of its own?

A Yes. We were taught that if the working class did

not have a goal of its own, separate and apart, it would not need a party of its own. It is because the working class, according to Communism, has a goal of its own for which it must achieve power in order to establish socialism.

It needs a party of its own to get to these goals, and that party is the party of Marxism-Leninism, the Communist Party.

Q Was this party described as being one of a new type?
A Yes, it was.

Q Will you explain that, please?
A We were taught that Lenin in analyzing the new stage of capitalism imperialism had shown that there was a new world situation, the situation of imperialism, and he showed that this is the era of Proletarian revolutions.

Well, in order to measure up to th new era of Proletarian revolutions, Lenin said, we were taught, we had to have a new type of party, a party that would measure up to this era of revolutions, a revolutionary party, a party of a new type with certain distinctive features to make it (tr. 603) possible to fulfill that role of leading the working class to victory in revolution.

Q Were you taught as to where the ideological principles of this party were laid down?
A Yes, we were taught that the ideological principles were laid down in Lenin's What Is To Be Done.

Q Were you taught as to where the organizational principles were laid down?
A Yes, we were taught that those were laid down in the pamphlet by Lenin, One Step Forward, Two Steps Back.

Q What were you taught as to what these organizational principles were, Mrs. Hartle?

A I was taught that these principles or features of the Party of the new type were that it was a vanguard party, that it was the highest form of class organization of the Proletariat, that it was an organized detachment of the working class or Proletariat, that it possessed an advance theory that it was the embodiment of the connection between the Party and the working class millions, beween the vanguard and the working class millions, and those are some of the features that describe the Party of the new type.

It was a Party of discipline and unity of will, democratic centralism.

Q Was it an organizational principle that the Party was an instrument to maintain the dictatorship of the Pro-
(tr. 604) letariat?

A Yes, it was an instrument. It was the instrument of the working class for the seizure of power and maintaining the dictatorship of the Proletariat.

Q Mrs. Hartle, you have already discussed the theory of exceptionalism, as I recall your testimony in connection with another course. Do you recall whether the theory of exceptionalism was also explained and refuted in the course on The Party?

A Yes, it was studied again there, and again refuted there.

Q Do you recall whether or not in this course on the Party there was a reference to a demonstration which occurred back in March of 1930?

A Yes, there was.

Q Will you tell us what was taught in that respect?

A We were taught that the Party led the huge, unemployed workers' demonstrations on March the sixth in 1930 which involved many, many thousands of persons, and that it was no accident that the date of March the sixth was chosen; that March the sixth, 1919, was the founding date of the Communist International.

MR. TAYLOR: Mr. Woerheide, can we be told where this is?

BY MR. WOERHEIDE:

(tr. 605) Q Do you recall where these unemployment demonstrations were held, Mrs. Hartle?

A We were told that they were held throughout the country, throughout the United States.

Q And throughout the United States were you told they were led by the Communist Party?

A Yes.

Q Were you taught in this course about strikes which occurred between the period 1930 and 1933?

A Yes.

Q What were you taught in that respect?

A We were taught that in the, that period, that the Communist Party which in 1933, that had fifteen thousand members, had led strikes in a number of industries involving workers that ran into the millions in numbers.

Q What were you taught with respect to the significance of these events, Mrs. Hartle?

A We were taught that the significance of this was that if the Communist Party would throw off the Brow 'er re-

visionism and would fully carry out its role of being active and participating in the struggles of the workers as it had done at that time before some revisionism crept in, that the Party would be in a much different and stronger position in the leadership of the working class of this country.

Q In this course was there teaching with respect to the (tr. 606) objective conditions which prevailed in 1933?

A Yes, there was.

Q What were you taught?

A There was teaching that in 1933 the objective conditions of a revolutionary situation obtained, that the crisis was very deep in this country, and that as far as the objective conditions were concerned, there was a situation where it would have been possible for the working class to be led to power.

Q Were you taught as to what was lacking at that time?

A We were taught that what was lacking at that time was a Bolshevized Party, a party of the new type, trained, tested and steeled and vanguard of the millions of working class.

Q Were you taught as to what action you and the other leaders of the Communist Party should take as a result of the lessons that you were being taught during this course?

A Yes, we were taught that in order to achieve the kind of Party that we needed, it was necessary above all to participate in the struggles of the workers and the masses.

Q Will you be more specific, Mrs. Hartle, regarding participation in the struggle of the masses.

A By that was meant and was taught, too, that it was necessary for the Communist Party first of all to be rooted in the basic industries of the country, that the Communist (tr. 607) Party had to be built in such industries as steel, railroad, auto, lumber, and other basic industries, the big

industries of the country, and that we had to build the Party in the basic industries of our respective territories that we came from, and take part in the labor organizations of those industries, and to work for leadership in those unions.

I recall Mary Himoff gave us an example of the great leadership, the great amount of positions that the Communist Party at one time held in some labor organizations, not only, but to a very large extent at that time, in the C.I.O. She explained to us that as we began to get a little bit off the track of Marxism-Leninism, there was a tendency to let other people of [sic] the top leadership positions, and then when it came to a struggle in these organizations, the Communists found that they lost a good deal of the influence that they had had in them, and she gave us that example, that the Communists want to work with other people in genuine unity, but that they don't want to work with them juso so that they can have a job and that the Communists may be pushed out.

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(tr. 621) * * *

Q Were you also taught other courses which were called practical courses?

A Yes.

Q Did you have a course called The Task of the Party Today?

A Yes.

Q Do you recall who taught that course?

(tr. 622) A It was taught by John Williamson.

Q Was that a theoretical course or a practical course?

A It was a practical course.

Q In substance, Mrs. Hartle, what were you taught in

this course?

A I was taught that the task of the Party today included in the first place bringing Socialist consciousness to the working class. In order to do this the Communist Party would have to fulfill its vanguard role.

Some examples were given us of how this vanguard role has to be fulfilled. One example was in the sphere of domestic policy. John Williamson told us that the Party had not fulfilled its vanguard role in relation to the railroad strike that had taken place not long before this school, and he taught us that in the coming maritime strike, it was necessary for the Communist Party to work, to mobilize the whole labor movement behind the maritime strike. He taught us that a general strike is not something that can be called just anytime that you want to call it, that preparation has to be made for general strike, that the workers have to learn how to come to each other's defense and how to jump into the struggle when it takes place, so that the whole working class will learn to move at once when a situation arises.

He gave us another example, in the sphere of foreign policy, of how the Party has to fulfill its vanguard role. (tr. 623) He said that up until now there had been an Anglo-Soviet-American unity, big-three unity, and that, of course, with this situation, we had been supporting in the main the foreign policy of the Government of the United States, but now there was something new in the situation. The new thing was that Winston Churchill at Fulton, Missouri, had called for an Anglo-American Alliance aimed at the Soviet Union, against the Soviet Union. This was the new feature in the foreign policy. And as a consequence the Communist Party had to be the vanguard in what was new in the situation and bring it to the working

class. And this meant turning the heat on American imperialism, American foreign policy.

He taught us further in the class that the, there is a difference between an average, honest trade-union leader and a Communist trade-union leader. He taught us that a Communist trade-union leader is equipped with Marxist-Leninist ideology which he gets from membership in the Party, and he taught us that Socialist and Communist consciousness does not arise of itself in the trade union struggle, but must be brought to it from outside, must be brought to it by the Communist Party.

He said that a Communist trade-union leader explains the connection between the immediate struggles of the workers, such as, for higher wages or shorter hours, and the ultimate struggle, the struggle for Socialism, shows them how there are two main contending classes, and the (tr. 624) working class is exploited, and these class struggles are taking place because of the exploitation, and the way to end the exploitation is for the working class to take power, and that the Communist Party is necessary to get this power, and that this is the type of consciousness that the Communist trade-union leader brings to the working class.

He taught us another part of fulfilling the vanguard role of the Party is to have a Communist Party of members that study Marxism-Leninism, as well as leaders that study it, and attempt to master the theory. He taught us, that another part of being a vanguard party is to be a party of struggle, that the Communist Party has been known in the past as a fighting Party, and that this fighting spirit had been practically killed by revisionism, and that it was necessary for us to have a Communist Party that led struggles and fights instead of trying to compromise or

smooth away the struggles.

He taught us—

Q By the way, did he make, did he cite any examples in this connection, regarding the failure of the Party to struggle?

A Well, I don't recall any at this moment.

Q Do you recall a reference to May Day activities?

A Oh, yes, I do recall that. He pointed out that in reference to struggle, that the only May Day Celebration Dem-
(tr. 625) onstration, that was held in the past in May of that year, that was held outdoors, was the one in New York City, and whereas in—and that all the other celebrations were held indoors in other cities and of the Party, but he reminded us that in years past there had been huge May Day Demonstrations of the workers and people in many cities, and that they were held outdoors and there were big parades with lots of slogans and banners and things like that.

Q Did he say what the Party should do in this respect in the future?

A He said that the Party should, along with other, along with organizing other activities, and demonstrative actions, should hold its May Day demonstrations out of doors in the form of parades and in the form of activities, rather than in meeting hall, just sit down and listen to some speakers.

He taught us in that class that the United Front tactic of the Seventh World Congress of the Communist International which was held in 1935, was just as valid today as it was at that time. He taught us that it is not enough for the working class to take up an issue projected by the Com-

munist Party, that the Communist Party's responsibility doesn't end there, that it is necessary for the Communists to work to raise the struggle to a higher level, to educate the workers in the course of struggle, and to raise that (tr. 626) level of consciousness to Socialist consciousness in the course of working on some of these broad issues, like wages, or speed-up, or some matter like that, that the working class has taken up.

He taught us that in the matter of recruiting members into the Communist Party that we must recruit basic industry workers from the concentration industries, that we must organize many shop and industrial branches of the Communist Party which had been abandoned in the Revisionist period under Earl Browder.

He taught us that in regards to the concentration policy we should remember that when we are concentrating on basic industries that this is not only important for the immediate situation, but that it is connected with the ultimate aim of working classpower and the obtaining of socialism.

Q Mrs. Hartle, do you recall any reference by Mr. Williamson to the independent role and the mass role of the Party in this connection?

A Yes.

Q What did he say in that respect?

A He taught us that the independent role of the Party, its own activities in its own name, are an important part of exercising its vanguard or leading role.

He said that the Communist Party must organize meetings, forums, put out papers, literature, and leaflets, speak in its own name to other organizations, before them, and (tr. 627) it must do this for the purpose of clarifying the

mass movement in which the Communists are also taking part, and the clarifying meant to give the workers the Marxist-Leninist information as to what is the real meaning of their struggle, what classes are involved, and what the aim of the struggle should be, and to give them the fundamentals of Marxism-Leninism in connection with these immediate struggles so that they can see that their immediate struggles, when they are led by the Communist Party, can lead to socialism and should lead to socialism.

Q Mrs. Hartle, were you taught the meaning of these terms "independent role" and "mass role"?

A Yes.

Q Could you explain to the jury what the meaning of these terms is, what the difference between them is?

A The independent role of the Party is the role of the Party in its own name. When it has a mass meeting and says the Communist Party is holding a meeting, and Communist speakers are going to speak, and it says it is the Chairman of the Northwest District of the Communist Party, and it is in its own name, that anyone that comes and listens to it knows that he is listening to the Communist Party. The same way with a newspaper or leaflet, when the Communist Party is exercising its independent role, issuing the leaflet on wages in its own name, it will say, We support the wage struggle of the workers; the reason we (tr. 628) support it, and then it goes on to deepen the understanding of the workers by saying why there is a wage struggle, who the classes are taking part in it, and how it is connected with foreign policy, what other things the workers should do besides struggle for these wages, and so forth. That is the independent role.

The mass vanguard role of the Communist Party is the

participation of Communist Party members in mass organizations, like trade unions, political organizations, pension organizations, veteran youth, women, Negro, and so forth. There the Communists are members in the mass organizations along with other members in there, and there they are projecting the policy in such a way that the organization as a whole will accept it, and there they are not, with some exceptions, but there in general and almost in ninety-nine per cent, at least, of these cases, they are not known as members of the Communist Party.

In the organization they are projecting the policies of the current program and many of the other ideas, but they do not reveal their membership in the Communist Party.

Q Mrs. Hartle, at this school did you also have a course called Methods of Agitation and Propaganda?

A Yes.

Q Who taught this course?

A George Siskind.

Q Was this a theoretical course or a practical course?

(tr. 629) A It was a practical course.

Q In substance, Mrs. Hartle, what were you taught in this course?

A In this course we were taught that the starting point of Marxist-Leninist educational activity in the Communist Party is to bring theory to the masses, that educational activity is not, doesn't have the main objective of teaching the members. This is subordinate to getting the Marxist-Leninist theory out to the working class and to the masses of people, and the reason the members are taught is so they can do this, so they can bring this theory to the masses.

We were taught that it was necessary to have an elabor-

ate educational apparatus in order to be able to carry through the whole principle of concentration of the Party, which is a policy of being able to concentrate all forces on one point, when necessary, in order to achieve the desired results.

We were taught that it was necessary, besides having an Educational Commission or Department, to have subcominittees in charge of issuing leaflets, issuing shop papers, issuing community and Negro papers, of issuing material and guiding the club educational program, of having a subcommittee to lead research projects, of having a subcommittee to lead theoretical projects, especially among (tr. 630) the more theoretically advanced in the Communist Party, to have committees that organize schools and classes, leadership training classes, and to have such an elaborate apparatus, including also the supervision of literature and press, and to have such an elaborate apparatus was necessary for the educational activity of the Party.

We were further taught that some of the mass features, features of the mass Marxist-Leninist educational program was to have broad non-Party Marxist schools for Communists and non-Communists, that these schools could teach a number of subjects, such as, Parliamentary Law, or Public Speaking, but that the ideology of Marxism-Leninism could only be taught by members of the Party, and that some professor that had studied it somewhere in some school on his own was not capable of teaching Marxism-Leninism in these schools.

We were told in these schools that it was possible and permissible and a good thing to have a broad Board of Directors, representatives of trade unions and other organizations, in such labor schools, but that the teachers of

the basic subjects of Marxism-Leninism had t, be Communists.

We were taught that the idea that teachers should teach, especially the Marxist-Leninist teacher, should teach without political supervision, without guidance, was a Bourgeois theory of education to leave the teacher to ramble (tr. 631) on as best he could by himself, and putting in his own ideas and his own quirks and whims was a Bourgeois theory of education.

Q What were you taught was the Marxist theory in this respect?

A The Marxist theory is that education in Marxism-Leninism must be supervised and guided by the Communist Party.

Q Besides these non-Party Marxist Schools and, by the way, I have one further question with respect to that.

Were these so-called non-Party Marxist Schools to be organized by the Party?

A The responsibility was to be taken by the Party and they were to be organized by the Party, but in the course of that, to attempt to involve other persons to help with the work who were not in the Party.

For instance, in getting students to the—

Q I see.

A To the School, or in getting help in purchasing a building, or renting one, and the administrative matters of that, to try to draw in other help, if possible.

Q Besides these broad, non-Party Marxist Schools, what other techniques were to be used to extend the Marxist-Leninist ideology to the masses?

A We were taught that we should make use of forums, either forums that we organize ourselves and invite other (tr. 662) speakers in, or to attend forums that someone else has organized and to speak there in them, to organize conferences, mass meetings, street meetings, shop-gate meetings, to make full utilization of the Communist Party press and literature, to organize shop and communist papers, Negro newspapers, in order to reach the broadest possible number of people.

Q Mrs. Hartle, what were you taught was the main form of educational activity within the Party itself?

A We were taught that the main form within the Party was the Club Educational.

Q And was there also another type of education that was used within the Party itself?

A The other type used within the Party was the organization of classes, usually would be night a week over a period of twelve or foruteen or sixteen weeks, or the organization of schools.

Q Was there also organized self-study within the Party?

A We were taught in the class that self-study is the basis of Marxist-Leninist education. Without self-study it would be difficult to have a, gain a mastery of Marxism-Leninism.

Q Were you taught that the Party should render help to Party members in connection with this self-study in some way?

A Yes, we were told that bibliographies should be fur- (tr. 633) nished to members so that they would have an idea of what they should study on certain subjects and would have a sort of a course outlined for self-study, and that the discussions should be held with them, that this

should be done on an assigned basis, certain people helping certain others, and that discussions should be held with them from time to time to encourage them to go forward and to answer their problems.

Q Mrs. Hartle, did you also have a course at this school called The Third Party?

A Yes.

Q Who taught this course?

A William Z. Foster.

Q What was his position in the Party at that time?

A He was the Chairman of the Communist Party of the United States then.

Q Was this a theoretical course, Mrs. Hartle, or a practical course?

A A practical course.

Q In substance, what did Mr. Foster teach you regarding The Third Party in the year 1946 at this school?

A In the year 1946 Foster taught us that the reason—that there is a reason why there is no farmer-labor party in the United States today, that it has this reason, has its historical roots, he said, that in the course of the American Revolution certain political rights were gained by the people. (tr. 634) the right to vote, bill of rights, and that as the working class developed in this country after the Civil War, these rights then obtained over to the working class.

Therefore, the workers in this country of the United States have certain elementary political rights, but that in the countries of Europe, especially in Central and Western Europe, the workers in a number of those countries did not have those elementary political rights. As a consequence, the working class in those countries organized po-

litically, and their basic demand was the right of suffrage, the right to vote, and that that was the main reason why there was no Third Party of the working class or farmer-labor party in this country, was because the workers had not seen the need of organizing such a party as they had seen in Europe, and he said as a result of this situation the trade-union movement in the United States, concentrated mainly on economic demands, like wages, hours and conditions, and when it did go into the political sphere, it was usually in regard to some legislation that related directly to the labor movement like slave labor or child labor or some things that more or less related directly to the economic conditions.

He taught us that the working class sees the need for organizing politically now, that it must have a party, a working, a party in which its allies are also organized, the poor farmers, in order to protect it against that—it has—(tr. 635) that with imperialism which continually develops on towards Fascism, the workers see the need of organizing such a Party in order to protect and keep the political gains that they already do have as a result of America's past.

He said that the organizing of The Third Party was a momentous and difficult and a very big job, and that it would require all of the political and organizational ability that the Communist Party possessed in order to help to bring it about, and it must be brought about.

Q What was to be the role of the Communist Party in bringing into existence this so-called Third Party?

A The role of the Communist Party, in the first place, was to project the idea theoretically, to convince the workers that they need this Party and why they need it, that they need it in their own defense, and to show the connection

between the need of the workers at home and the foreign policy, point out to the workers that American imperialism was driving towards World War III—imperialism inevitably does—and matters of that kind, to make the workers realize, all of them, that they need this Third Party, and to have it to defend the country and defend themselves.

The further role, I think I mentioned it, was that the Communist Party would have to organize it as well as to project it theoretically.

Q Mrs. Hartle, at this school did you also have a course (tr. 636) entitled The Negro Question?

A Yes.

Q Who taught this course?

A Henry Winston.

Q What was Henry Winston's rank and position in the Party at that time?

A He was a National Officer of the Communist Party.

Q On the National Committee?

A Yes.

Q And the National Board?

A Yes.

Q What were you taught by Henry Winston with respect to the Negro question, Mrs. Hartle?

A We were taught that the Negro question in the United States today is a special question, but in the era of imperialism this problem could not be solved aside from the working class and the Communist Party.

We were taught that the Negro people in the Black Belt of the United States are a nation and that they are an oppressed nation.

Q Where were you told that this Black Belt extended, Mrs. Hartle?

A We were told that it extended from the Southern borders of Maryland down through Mississippi and down through Louisiana, that it, its backbone, so to speak, is, (tr. 637) are some 172 counties, according to the 1940 census, which contained a majority of Negro people in their borders, and that a, some peripheral area which does not contain a majority of Negro people but is sort of woven in between these counties, is also a part of the area, and we were taught that this area coincides in the main with the plantation system.

Q What definition of the word "nation" was used in this course, Mrs. Hartle, and whose definition was it?

A The definition was that of Joseph Stalin, and came from his book, Marxism and the National Question.

The definition was that a nation is a stable community of people historically evolved, possessing a common language, territory, and economic ties and make-up manifested in a community of culture.

Q Was the phrase "national oppression" also defined?

A Yes, that phrase was also defined by Stalin in the same book as being a system of suppression and exploitation of one nation by another nation, one nation oppresses another nation.

Q Was the element of force inherent in this concept of oppression?

A Yes. It is done with force and by suppression.

Q Now, what were you taught, if anything, in this course with respect to self-determination?

A I was taught that a nation, any people that has all

(tr. 638) these qualities that I have enumerated in the definition, and it has to have them all to be a nation. It can't have just two or three of them. It requires all of these qualities to be a nation—have the right to self-determination, a right to determine their relation to other nations. A nation has a right to secede. It has a right to federate, whichever seems to suit it best in the situation in which it finds itself, and that the Negro people in the Black Belt of the United States being a nation, while they might not wish to do so, do have the right to secede from the United States.

Q And do I understand to establish a separate community outside the United States?

A To establish their own country, their own government, their own everything. They have that right. That is inherent in the theory of a nation.

Q What did he say, Mrs. Hartle, if anything, regarding using at that time a slogan, Self-determination, in an election platform?

A He said that while this is the basic theory of the Party and the basic position, programmatic position of the Party, that this slogan of self-determination should not be used in a sectarian manner in putting it into an election platform, that the Negro nation in the United States is a young nation, does not recognize itself as a nation, resists being considered as a nation and to put this slogan in such (tr. 639) a thing as an election platform would just serve to isolate the Communist Party from the Negro People.

Q Did he make any reference to a connection between the question of Negro, a Negro nation and the question of the class struggle?

A Yes. He taught us in the class that in the epoch of imperialism, which is the epoch in which the United States, in which the United States is in along with the rest of the

capitalist world, that in this era, the Negro people and the Negro nation can make no substantial progress without being in alliance with the working class, that the link to this is Negro-white unity, and that the specific link is the Negro working class, inasmuch as the nation has other classes besides workers, that the link between the working class and the Negro people as a whole is the Negro working class.

He taught us that the Negro nation in the United States cannot expect to fulfill its aspirations for full political, economic and social equality without being in alliance with the working class and led by the Communist Party.

Q Did he say—were you taught as to who must lead this struggle for liberation of this oppressed Negro nation?
A Yes, that the Communist Party must lead this struggle in our situation in this country today.

Q All right. Mrs. Hartle, were you also taught a course in this school called The U.S.S.R.?
(tr. 640) A Yes.

Q By the way, what are the initials U.S.S.R., stand for—
A The Union of Socialist Soviet Republics.

Q Is that another way of saying Russia?
A Yes.

Q Who taught this course, Mrs. Hartle?
A Jacob Mindel.

Excuse me. That course was taught by Max Weiss.

Q Do you recall any materials that were used in the teachings of this course?
A Yes.

Q What were they?

A The History of the Communist Party of the Soviet Union and a number of articles and speeches by Joseph Stalin.

Q Mrs. Hartle, what was the substance of the teaching of Max Weiss in this course?

A The substance of the teaching was that when we study the subject of socialism today, we study the Soviet Union, that it is not enough in the Communist Party to discuss and study Socialist principles in the abstract, as had been done in Socialist parties and movements in the past, that today there is a Socialist country in the world, a working class that has gained power, established the dictatorship of the Proletariat, and has exercised that dictatorship (tr. 641) and, therefore, the Communist Party studies socialism not in the abstract but in its concrete manifestations in the Soviet Union.

He taught us in the class that the, what the reasons were why it was comparatively easy for the Russian working class to take power and led by the Bolsheviks, which was the name of the Communists in Russia, and the reasons that he gave us were that the Bourgeoisie or the capitalist class there was an inexperienced Bourgeoisie, that they used a very stupid policy, and did not drive sections of the working class such as had been done in Great Britain and the United States and other capitalist countries.

Secondly, that this Russian capitalist class didn't get any help from the rest of the capitalist class of the world because the imperialists were in the war and they were split and divided and couldn't bring their attention to bear to crushing the Russian Revolution sufficiently early enough.

The other reasons given were that there was a Bolshevik

Party that was fourteen years old which had emerged in 1903, that he told us at that time that inasmuch as the Communist Party was then twenty-seven years old, if the Communist Party of the U.S.A. had used the same timetable as the Bolshevik Party that the dictatorship of the Proletariat would have obtained in this country in 1934, and that information was taught us in the class.

The second, another reason given was that the Russian (tr. 642) working class led, the Russian working class had been through two revolutions. The one of 1905 and the February Revolution of 1917, and that another condition given was that the working class and the peasantry in Russia had had a long-term alliance, that they had had a long-term agreement of supporting each other's interest and were in the habit of supporting each other's interest.

Those were given as the main reasons why the working class in Russia was able with comparative ease to gain power.

Q Mrs. Hartle, in—

THE COURT: Mr. Woerheide, let me interrupt you a minute.

Take a short recess. Let the jury retire.

(The jury retired to the jury room.)

(After recess.)

(The jury returned to the jury box.)

(The witness resumed the witness stand.)

MR. SMITH: Mr. Woerheide—if Your Honor please,

there is a matter we would like to take up with the Court. Take about five minutes, and perhaps at the noon recess, just after the jury leaves and before we adjourn.

THE COURT: All right, sir.

BY MR. WOERHEIDE:

Q Mrs. Hartle, just prior to the morning recess in dis- (tr. 643) cussing what was taught you by Max Weiss in the class on the U.S.S.R. in the 1946 Stalin-Foster School, you had just mentioned, as I recall, a reference to an alliance in Russia at the time of the Russian Revolution of the working class and the poorest peasantry as a factor in bringing that revolution about.

Was any reference made by Max Weiss concerning a group which corresponded in the United States to the Russian peasantry of the revolutionary period?

A Yes. A reference was made that the poor segment of the poorest farmers in the United States are the Negro people, and especially in the South, and that the peasant, that the peasant question is the backbone of the national question, and that the peasantry in terms of American people will be in a large part the Negro people of the South.

Q In this course, Mrs. Hartle, were you taught by Max Weiss just how long it took for the Revolutionaries to seize power in certain parts of Russia at the time of the October Revolution?

A Yes. He taught us that power was taken in one day in Petrograd, in a couple of days in Moscow, and that throughout the whole country of Russia it was a matter, a longer matter of time, of months.

Q Did they teach you how that power was seized in Petrograd and Moscow and other areas of Russia?

(tr. 644) A He taught us that it was a forcible seizure of power through the destruction of the existing Bourgeoisie state machine and the establishment of a Proletarian state machine.

Q What did he teach you with respect to the task which at that time confronted the Russian Proletariat led by the Bolsheviks?

A He taught us that the task that confronted the Russian Proletariat led by the Bolsheviks was, one, the smashing of the Bourgeoisie state machine. He said that the armed forces, courts, prisons, administrative apparatus, police, had to be smashed, that one of the first things that was done was to issue a decree forming a Red Army and Navy, but that it was not possible to form this Red Army and Navy just in a day or two and that the first steps that were taken were to attach commissars from the Bolshevik Party to the old officers' staffs, that immediately Red guard units were formed, and that a workers' militia was established.

He taught us that the police was liquidated and that the first step that was taken in the Russian Proletarian Revolution was to set up an all-Russian Extraordinary Commission in, to take the place of police, which was known as the Vezcheka, V-e-z-c-h-e-k-a.

He told us that the smashing of the administrative bureaucracy was a longer process and took a longer length of time.

(tr. 645) Q What did he say about nationalization of land?

A He said that another task of the, facing the Russian

working class led by the Bolsheviks was the nationalization of the land, that they confiscated the land of the church, nobility, and landlord class, and he taught us that today land in the Soviet Union is not owned by private individuals but is owned by the government. All land is owned by the government.

He taught us that another task that faced the Bolsheviks was the nationalization of industry, and that in the first stages of the revolution not all industry was nationalized but that the banking, railroad, communications, heavy industries and foreign trade were summarily taken over by the Bolsheviks' government as government spheres instead of spheres of private operations, and he taught us that the ending of the war with Germany was another task that faced them to secure peace and that to this effect they made the Brest Litovak, L-i-t-o-v-a-k, Peace Treaty, which was a compromise peace treaty, in order to give the Proletarian Revolution a chance to pull itself together and to be successful.

Q Did he teach you anything regarding the official status of the Communist Party in the Soviet Union?

A Yes. He taught us that in the Constitution of the Communist Party, he taught us that in the Constitution of the Soviet Union the Communist Party is mentioned. But that (tr. 646) the Communist Party of the Soviet Union is not a state organization.

He taught us further that in the Constitution of the United States no political parties at all are mentioned. And he said that there is only one party in Russia in the Soviet Union because there is only one class to be represented, that an opposition party in the Soviet Union would have to represent the interests of another class and would, therefore, be counterrevolutionary.

Q Recall Max Weiss discussing World War II in his course on the U.S.S.R.?

A Yes, Max Weiss said in this course that the imperialist phase of World War I, the first phase of World War II was an imperialist war, a phony war, not a fighting war, and that for the Communist Party of the United States to have supported that war on the allied side at that time would have meant attacking the Soviet Union through Finland.

Q Mrs. Hartle, were you taught whether or not the Communist Party in the United States in preparing for the Proletarian Revolution shall be guided by the experiences of the Bolshevik Party in Russia at the time of the Russian Revolution?

A Yes, we were taught the Communist Party should study very seriously the History of the Communist Party of the Soviet Union, that that was one volume which (tr. 647) more than any other volume would give experience and guidance to the American working class.

Q Mrs. Hartle, at the closing of this school were any remarks made regarding what you and the other students of the school should do with respect to what you had learned there?

A Yes, there were remarks made that the students—

MR. TAYLOR: Excuse me, Mr. Woerheide.

BY MR. WOERHEIDE:

Q Just a moment. Will you tell us what type of session this was, who was in charge of it, who attended it?

A There was a session in the National Training School in which a resolution was considered, the discussion among

the students and with the Director of the school in charge was to form a resolution to be passed by the school.

Q Who on the faculty attended this session, Mrs. Hartle?
A Jacob Mindel.

Q Would you tell us what happened at that time?
A At that time a resolution was drafted and was passed on by the student body.

Q What was the substance of that resolution, as you recall it?
A The substance of the resolution was to express what the students felt they had learned in the school, that they had deepened their understanding of Marxism-Leninism, (tr. 648) and that they would be more able in carrying out the practice and policies of the Communist Party, would be more effective in carrying these tasks of the Party out when they went back to their respective districts and assignments.

The resolution thanked the National Committee for having made it possible to come to this school in order to study the way they had. The resolution said that the students felt that the school had made a big contribution to the struggle to root out all remnants of Browder revisionism, from Marxism-Leninism. Those are some of the things that I can recall.

Q Did Mr. Mindel make a talk telling you about how you should apply the knowledge that you had acquired?
A Yes.

Q Was this talk made on this occasion?
A It was made at the end of the school.

Q Yes?

A In the session.

Q In substance, Mrs. Hartle, what did he say?

A He said that the students who had been in the school should not now quit studying, that they should continue their study of Marxism-Leninism inasmuch as self-study is the basis of a fuller grasp continually of Marxism-Leninism, and he said that it was the duty of persons who had learned the theory of Marxism-Leninism to bring it to the rest of (tr. 649) the Party and to bring it to the masses of the workers and people in the struggles in which we would be participating.

Q Following the school, Mrs. Hartle, did you return to Seattle?

A Yes.

Q Did you resume your connection with the Communist Party in the Northwest District?

A Yes.

Q Were you informed concerning the evaluation of your work at this school?

A Yes.

Q Who informed you concerning this?

A Henry Huff.

Q What was his position at the time?

A The Chairman of the Northwest District of the Communist Party.

Q What did he tell you regarding the Party's evaluation of your work at this school?

A He reported that the evaluation of my work was that I had been a very good student and that this information had been given him by Henry Winston.

Q Upon returning to Seattle, Mrs. Hartle, what respon-

sibilities did you assume in the Party?

A For a time I was Educational Director, for another few months, of the Northwest District.

(tr. 650) Q Thereafter did you teach in Party schools?

A Yes.

Q Did you also teach in other schools that were maintained by the Party but which were not called Party schools?

A No.

Q Was there such a school maintained by the Party out in Seattle?

A Yes.

Q What was the name of it?

A It was the Pacific Northwest Labor School.

Q Had you previously taught in that school, Mrs. Hartle?

A I had taught in it when it was still known as the Seattle Workers School.

Q When was that?

A In the 1942, '43 and '44.

Q Was it the same school excepting it was known by a different name?

A Not exactly the same school. The Workers School was aimed primarily at Communist Party members. Then that was evolved into the Seattle Labor School and that its aim was to try to attract other persons in some numbers besides just Communist Party members, and then that was changed to the Pacific Northwest Labor School where a considerable effort and considerable success was made in obtaining other students besides Communists, and I think (tr. 651) that sometime the Communist Party rented that building to hold its own District full-time training schools.

There I taught in the building but not in the school.

Q This school, what was the name of it again, the Pacific Northwest—

A Pacific Northwest Labor School.

Q —Labor School. Was that a school that was controlled by the Communist Party, Mrs. Hartle?

A Yes, it was.

Q Were the courses on political subjects in that school taught by members of the Communist Party, if you know?

A In the Pacific Northwest Labor School?

Q Yes.

A Yes, the courses on Marxism-Leninism were taught by leaders of the Communist Party and members of the Communist Party.

Q Now, Mrs. Hartle, after you returned to Seattle did you make use of the notes you had kept and the teaching you had received at the Stalin-Foster School in teaching members of the Party in the Northwest District?

A Yes, I did.

Q Do you recall what schools and what classes you taught in the Seattle area after you returned from the Stalin-Foster School?

(tr. 652) A Yes.

Q What were they?

A I taught in a District full-time, one week, training school, in 1946, after I had returned from the school, and there I taught the subject of Political Economy.

In 1947 I taught in another full-time District Training School, a two-week full-time District Training School, and there I taught the subject of the basic theory of the Com-

munist Party.

In 1948 and '49 in that winter period, I taught a class of South King County Functionaries of the Communist Party one night a week on the theory of Marxism-Leninism, using the material on Political Economy, Dialetical and Historical Materialism and the other material of the school, going through them one after the other.

Q Do you recall how many weeks that course lasted?
A About fourteen weeks.

In 1948 and '49 and '50 I taught in a large number of week-end schools in the, in Seattle, in Tacoma, Washington; Everett, Washington; Bellingham, Washington; and Spokane, Washington, on the National and Negro Question. That was a series of class, week-end schools, in these places.

I also taught classes in Tacoma, Washington, in the 1949-50 period based on the outline, the Fundamentals of Marxism-Leninism and used the National Training School (tr. 653) notes also. That was a course of about fourteen weeks, and during that period I taught other schools and classes in Seattle and other cities in the State of Washington.

Q Did you also hold Branch and Section Educationals in various places at various times?

A Yes. I, during that, during that period was continually attending Branch meetings all over the Seattle and in the latter part, all over the state, and was continually attending Section meetings and giving Educationals on some part of the Party's theory.

Q Do you have Exhibit 25? Yes.

Mrs. Hartle, I show you Government's Exhibit 25 and ask you if you can identify this document?

A Yes.

Q What is it?

A It is an outline on the Fundamentals of Marxism issued by the National Education Committee of the Communist Party U.S.A. It is the outline that I referred to that I used in the classes in 1948, '49, '50 period, and specifically referred to in the Tacoma class of fourteen weeks on Marxism-Leninism.

Q Who was National Education Director at the time this outline was prepared, Mrs. Hartle?

A Max Weiss.

Q Did you receive that in your capacity as Educational (tr. 654) Director of the Northwest District of the Party?

A Yes.

Q How many copies did you receive?

A We received several copies, as I recall, ten or twelve copies.

Q Did they suffice for your needs?

A No.

Q What did you do?

A Under my direction at that time, I was Educational Director, 200 copies of it were reprinted, were remimeographed of that outline for the distribution to the Sections and Clubs in our District.

Q Mrs. Hartle, do you recall a class for trade-union leaders which you took over?

A Yes.

Q Do you recall who taught this class prior to the time that you took it over?

A Yes. That was taught by Andrew Remes, the District Labor Director, before I took it over.

Q Who were the students in this class?

MR. TAYLOR: Excuse me, Mr. Woerheide, can we know when?

BY MR. WOERHEIDE:

Q Do you recall when it was you taught this class, Mrs. Hartle?

(tr. 655) A In 1947, 194— around that winter.

Q Who were the students in this class?

A 1948.

The students were members of the Party in leading positions of influence in the labor movement, in the trade unions.

Q Do you recall the texts you used?

A Yes, I recall some of them.

Q Which ones do you recall?

A I recall that we used the Communist Manifesto, by Karl Marx; Left-Wing Communism: An Infantile Disorder, by Lenin and Marx; and the Trade Unions, by Losovski, and that we used other material such as I used in other classes on Political Economy and Dialectical and Historical Materialism and matters of that kind.

Q Who asked you to take over this class, Mrs. Hartle?

A Henry Huff.

Q Do you recall any conversation you had with him at this time?

A Yes.

Q Will you tell us what that was, please.

A The conversation was that he told me that inasmuch as Andrew Remes was leaving, that it would be necessary for me to teach this class of trade unionists. I said to him that I wondered whether I would be qualified to answer (tr. 656) the questions and meet the problems of leading trade unionists, inasmuch as my experience in the labor movement was somewhat limited, and he said that what the, what the trade unionists needed to learn I could teach, that they needed to learn Marxism-Leninism, that I didn't need to worry about telling them how to be a business agent They could figure that out themselves, but it was Marxism-Leninism is what I was supposed to teach them, and that I could do that.

Q Mrs. Hartle, in this course that you taught, did you give any teaching with respect to sectarianism?

A Yes.

Q What did you teach in that respect?

A I taught that sectarianism plays into the hands of the enemy, the enemy being American imperialism and the capitalist class.

Q Well, did you teach what sectarianism was?

A Yes.

Q What did you teach in that respect?

A I taught that sectarianism in the shouting of revolutionary phrases, phrase mongering, just putting forth the fundamental principles of Marxism-Leninism as they are written in the basic program without any explanation of what they mean to the workers today, or how they will get to where they want to go, socialism; that sectarianism is a person who reads the basic material and then spouts it (tr. 657) willy-nilly with no concern as to how it will be

taken, and having no beneficial effect for the working class struggle, and I taught in the class that we must avoid sectarianism, phrase mongering, beating our breasts and saying we are revolutionaries and we want the dictatorship of the Proletariat, but that what we needed to do is to get into the struggle of the masses, be in their organizations and trade unions, get to work on the issues that the workers and people are interested in, and then to deepen the understanding, the theoretical understanding of the workers in the course of these struggles, but in such a way as not to drive them away or to isolate the Party from the class or the masses.

Q Mrs. Hartle, in this course was there any discussion with respect to specific type of problems, such as, a demand for a wage and such as negotiation with an employer?

A Yes. In the class I taught that the Communist Party has to be the vanguard and is the vanguard and that it must, trade unionists must act like a vanguard in the trade unions, and when the workers feel that, well, they probably can get a ten-cent-an-hour wage increase and maybe it won't be very much trouble to get it, that the Communist leadership will give leadership to the workers and even enthuse them and convince them that they can get twelve cents an hour, and if the workers say, well, but it might mean a strike or trouble, then the trade union leader ex- (tr. 658) plains that, how this struggle can be organized and how you can get a list to support the struggle, and how it's much better to make twelve cents with a struggle than ten cents without one, because that teaches the workers how to fight and next time it comes around, if you teach him with one strike, the next time it will be easier to get the twelve cents without striking and very many matters along that line.

Q Was there any discussion in this school as to whether or not a member of the Communist Party in a trade union organization should expose his membership?

A Yes. There was. There was discussion that it was very important for the Communist Party to work in the trade union movement, and specifically, to work in trade unions that did not have a left progressive or Communist leadership, that it was necessary to work in these organizations and be in them and by calling themselves Communists or divulging that they are members of the Communist Party in many cases they would be summarily expelled out of the union because many of the unions wouldn't allow Communists to be in them, and that in addition to that even if the union wouldn't expel them, that to get up and say you are a Communist would make it difficult to give leadership in the union and to gain the confidence of the workers, leading them in their struggles, so that eventually many of them would join the Party after their confidence was established, whereas, if they found it out pre-
(tr. 659) maturely, they would just shy away from that person and not learn anything more from them.

Q Now, Mrs. Hartle, did there come a time when, as an official of the Northwest District of the Communist Party, you and your fellow officers of the Party were called upon to put into practice the teaching which you had received at this school about the necessity for establishing The Third Party?

A Yes.

Q Will you tell us how that came about, Mrs. Hartle?

A In 1947 the Communist Party said that it was necessary to have a Third Party and it said that supporting the Progressive Citizens of America was a correct step in that direction, that the Communist Party should support and

help organize, help organize this organization.

Then the Communist Party said that the Third Party should take the form of the Progressive Party and it said that the P.C.A., the Progressive Citizens of America, had just been a forerunner and that now that a Third Party should be established, and that the program of the Party then that was carried out was, was the first to carry through the founding of the Progressive Party in the State of Washington. In preparation for the founding convention of the Progressive Party in Seattle, Washington, the Communist Party members were instructed to take part in securing signatures of persons to enforce this founding con- (tr. 660) vention, and the technique was that if twenty or so persons signed it, the person could be a delegate representing them at the founding convention.

Q Mrs. Hartle, in obtaining these signatures, did the Party operate only through the Party structure, or did it also operate through other organizations?

A Yes, it operated through other organizations. The Party through its influence with members in trade unions had a number of trade unions and other organizations endorse the idea of founding the Progressive Party.

Another thing that the Communist Party did that time in preparation was to withdraw a number of Communists who were in the Democratic Party precinct organizations in the City of Seattle, and that was organized so that the Precinct Committeemen, who were Communists, plus as many others as they could convince who were not Communists, would leave in a body out of these precinct organizations, and some officials in the Democratic Party resigned, stating that what was needed was a Third Party, and these were Communists who were in the Democratic Party at that time.

Q Now did there come a time when there was an election campaign in which this Third Party participated?

A Yes, there did.

Q What did the Communist Party do in that respect?

A Well, the Communist Party specifically, the District Board of the Northwest District, discussed and decided (tr. 661) the arrangements for the founding convention of the Progressive Party, for the officers of the Progressive Party, for the candidates that were to be selected to run, and through the decisions of the District Board and Committee the whole Party participated in campaigning for these candidates, and trying to help get them elected.

Q Did this Progressive Party have candidates on the national ticket, Mrs. Hartle?

A Yes, it did.

Q Did they have a candidate for president?

A Yes.

Q Who was he?

A Henry Wallace.

Q Did they have a candidate for vice-president?

A Yes.

Q Do you recall who he was?

A Glenn Taylor. As I recall he withdrew, and before the campaign was finished.

Q Did they also have candidates for various local and state offices?

A They did in the State of Washington.

Q How many votes, if you recall, did this party poll in the State of Washington?

A I don't recall the number of votes. I know it was not large.

(tr. 662) Q In connection with this campaign, did the Party arrange speaking tours for the candidates?

A Yes, it did.

Q Did they arrange other types of meetings?

A Yes, the Party organized forums so that candidates could speak. It organized speakers of the Progressive Party, leaders, of the Progressive Party to go to any and all possible organizations in order to popularize the Progressive Party and gain support to it. It organized conferences on various issues, such as, workers, and veteran and pension and Negro and other needs and made it, made these conferences available for Progressive Party leaders to speak, to popularize their organization.

Q Did the Party put out any literature in connection with this campaign?

A Yes. The Communist Party put out the Northwest edition of the Daily People's World of San Francisco, and in that edition carried a great deal of news about the Progressive Party, its candidates, its program, the need to campaign for it, and the Communist Party also issued literature and leaflets in great abundance, supporting their idea of an independent Third Party.

Q Mrs. Hartle, do you recall a period when the Party engaged in an action program called The Stockholm Peace Pledge?

(tr. 663) A Yes.

Q When was that?

A That was around the beginning of 1950, latter part of 1949.

Q Did the Party receive instructions from the National Organization regarding this campaign?

A Yes, it did.

Q Was this campaign discussed among the District leadership of the Northwest District of the Party?

A Yes.

Q What was your position at that time?

A At that time I was the Educational Director of the Northwest District. I was also at that time in charge of youth work, literature work and the Aircraft Concentration Committee.

Q What instructions did you receive, Mrs. Hartle, regarding this Stockholm Peace Pledge campaign?

A The instructions we received was that the signature campaign for this Stockholm Peace Pledge was to receive the top priority in the Communist Party, that every bit of its resources, political, organizational, educational, had to be thrown behind this signature campaign.

The program of action to be carried out included pushing this pledge in the press of the Party and printing it there, so the people could clip it out and sign it and ex-
(tr. 664) plaining all about it.

It included putting out many, many leaflets, in the hundreds of thousands of leaflets, so that people could sign those leaflets and be a part of the signature campaign. It included the organizing a concrete program of action in every single Section and Club of the Party to see that basic working-class neighborhoods are canvassed, that shops where workers come out of shops are covered, that big gatherings such as baseball games or church meetings, and other large gatherings were to be covered where lots of people are going by and there is a very intensive drive to secure a large quota of signatures to that Stockholm Peace Pledge, and a part of the plan was to use every ounce of influence in the mass organizations and trade

unions, to have them to endorse the pledge, to have them to work for signatures for it, wherever you could, wherever that wasn't possible, to engage as many members of the organizations independently in doing it, and a program of very intensive, concrete and diversified character was carried through on that in order to get that goal of signatures.

Q Mrs. Hartle, in the discussions which you had concerning the Stockholm Peace Pledge on the District level at that time, was anything said about the relative position of the United States and Russia with respect to the possession of the atom bomb?

(tr. 665) A Yes.

Q What was said?

A Well, it was said that the United States had the atom bomb, and that the United States foreign government was pursuing an atom bomb diplomacy of threatening the Soviet Union with war because it had this atom bomb, and the Soviet Union didn't have it.

Q Do I understand the Soviet Union did not have the atom bomb at that time?

A They did not.

* * *

(tr. 666) * * *

Q Mrs. Hartle, I show you document marked for identification as Government's Exhibit No. 35 and I ask you if you can identify it?

A Yes. This is an outline issued by the National Education Department of the Communist Party on China.

Q At the time this was issued what was your position in the Party?

A I was the Educational Director of the Northwest District.

Q Did you receive a copy of that outline in your official capacity?

A Yes, I did.

Q Is that a copy of the outline which you actually received?

A Yes, it is.

Q Is that particular copy which you have in your hand—

A Oh, you mean was this my own copy?

Q Yes, or one of your own copies?

A Yes, this was one of my copies.

Q Thank you. Well, what was the approximate time when you received this, Mrs. Hartle?

A It was in 1950, early part of 1950.

(tr. 667) Q Over a period of time had you received instructions from the Communist Party with respect to the so-called China problem?

A Yes.

* * *

MR. WOERHEIDE: Can you tell us in what years you received instructions, Mrs. Hartle?

THE WITNESS: Yes, I think so.

BY MR. WOERHEIDE:

Q Will you tell us what particular instructions you received and particular years, if you can recall that?

A In the early, around the 1938 period, the Communist Party received instructions to circulate the magazine, China

Today, and did so for a several-year period and called for nonintervention on the part of the U.S.A. in the affairs of the Chinese people or the Chinese Government, hands-off policy, to stay out of China, and in the period of 1950 I specifically recall that when the Chinese Communist forces were, had taken Manchuria, and were seemingly about ready to take over the, had taken Northern China and were (tr. 668) about ready to take over the Central and Southern China, that at that time the Communist Party carried on an extremely intensified campaign of hands off China, no intervention in the internal affairs, that this is American imperialism to interfere in their affairs, and called for a campaign to support the recognition of China even before the new government had been formed over there, but campaign ahead of that, that the United States should recognize the new Chinese Government which was going to be set up as soon as the victory was finished, and called for trade with China. And the Communist Party, on the West Coast, had the assignment of concentrating on the trade-with-China question, and said that many business interests would give some support to the new China on the basis that they had been assured that they could trade and increase their trade.

Q Mrs. Hartle, the policies that you have just outlined as having been advocated by the Party, are they set forth in this document which you have in your possession?

A Yes, they are.

MR. TAYLOR: Your Honor, I will object to that. The document speaks for itself—a conclusion of the witness.

THE COURT: Objection overruled.

THE WITNESS: Yes, sir; they are.

MR. WOERHEIDE: Your Honor, I ask that the docu-
(tr. 669) ment be received in evidence.

* * *

Q Mrs. Hartle, is there a section set forth in that document called Actions Proposed?

A Yes.

Q Were those the instructions sent out by the Communist Party National Organization as to what local organizations of the Party should do in the way of action with respect to this campaign?

A Yes, they were.

Q What action were you told to take, Mrs. Hartle?

A We were told to connect the educational, all educational work with the China issue and we were told to organize picket lines around the China issue in as many ways as possible.

(tr. 670) We were told to organize mass meetings, forums, conferences. We were told to get as many organizations as possible on record on the China policy, and we were told to utilize the press and literature and leaflets in making known the Communist Party's position, a number of actions like that.

Q Mrs. Hartle, as Educational Director of the Party in the Northwest District, did you set in motion an action program pursuant to those instructions?

A Yes.

Q Who participated in this action program?

A The participants were the members of the Communist Party and as many other persons as they could involve in it.

Q Mrs. Hartle, do you recall a period when a war situ-

ation broke out in Korea?

A Yes.

Q Do you recall the approximate date?

A Well, it was in the early part of 1950.

Q What was your position in the Party at that time?

A I was the Educational Director of the Northwest District.

Q Did you have other responsibilities at the same time, Mrs. Hartle?

A Yes, I did. I was Director—

Q What?

(tr. 671) A I was Director of the youth work, in charge of literature work on the District Board and District Committee of the Communist Party, and on the Negro Commission of the Northwest District.

Q What instruction did you receive from the National Organization of the Party with respect to the Korean War, Mrs. Hartle?

MR. TAYLOR: May we have the date, please, Mr. Woerheide?

THE WITNESS: The date was the early part of 1950. The first part of 1950—I don't remember the exact date of the outbreak, but it was in the first part of 1950.

BY MR. WOERHEIDE:

Q You received these instructions at the time that war broke out; is that correct?

A Yes, that is correct.

MR. TAYLOR: I object. Didn't she answer she received

them early 1950?

MR. SMITH: Leading on the last question.

THE COURT: Well, I think she previously had said that the Korean trouble began in 1950, had she not?

THE WITNESS: I had said that.

THE COURT: And what is the objection now?

(tr. 672) MR. TAYLOR: Well, the last question I thought was leading her to a different answer, Your Honor, seemed to me she had said the instructions were received in early 1950, and then Mr. Woerheide led her to say that came when the war broke out.

THE COURT: Well, that is the reason I mentioned her previous statement. I think the question is justified on that basis.

BY MR. WOERHEIDE:

Q Mrs. Hartle, did you receive instructions regarding the Korean War from the Party prior to the outbreak of the Korean War?

A No.

Q When did you receive these instructions in relation to the time when the Korean War started?

A Just immediately after it was started, in a few days.

Q What were these instructions, Mrs. Hartle?

A These were instructions, were to oppose the Korean War as a war of imperialist aggression on the part of the U.S.A.

Q What were you told to do?

A We were told to protest the action of the United

States in supporting that war, to protest to the President, and State Department; and Senators and Representatives of (tr. 673) the Congress, and to many other political people; to raise the question and get protests from trade unions, mass organizations; to utilize the press and literature and leaflets, and one thing we were told to do immediately was to issue a large issue of leaflets, of some fifty thousand, or thereabouts, a very large issue, using the slogan "Stop the War in Korea," "Stop the Drive to Imperialist World War III."

Q Was anything said about meetings?

A Yes. We were told to hold meetings in which speakers will expose that this is an imperialist venture on the part of the American imperialist government, to hold street, shopgate meetings, street meetings, hold discussions in all the branches.

Q Pursuant to these instructions, Mrs. Hartle, to hold meetings, did you, in fact, hold such meetings?

A No, we did not hold such meetings on the subject until we got instructions.

Q After you received instructions to hold meetings, did you in fact hold such meetings?

A Yes, then we did.

Q What type of meetings were they?

A They were mass meetings, organized in rented halls, in Washington Hall, Firnish Hall, the Swedish Club Halls in Seattle. They were meetings that had an attendance of some five hundred or even less, and some would be more. (tr. 674) almost up to a thousand and—

Q Did you have street-corner meetings also, Mrs. Hartle?

A Yes, we had many street-corner meetings during that

period of the Korean War at which I spoke.

Q Can you state whether or not members of the Communist Party were ordered to participate in this activity, that is, members on the lower echelons of the Party?

A Yes, they were.

Q Now did you carry out the instructions to get resolutions passed by other mass organizations?

A Yes.

Q Did you carry out the instructions to have letters written?

A Yes.

Q To the President of the United States and other officials of the United States?

A Yes.

Q Do you recall any statements being issued by the Party at this time regarding the alleged commission of atrocities by American soldiers?

A Yes.

MR. TAYLOR: May we have the time, please, Mr. Woerheide?

BY MR. WOERHEIDE:

(tr. 675) Q When were these statements made, Mrs. Hartle?

A They were made during the Korean War in—well, around the middle of 1950, and latter part of 1950, that I can recall.

* * *

THE COURT: Suppose we take a break at this time.

* * *

MR. TAYLOR: I think it does. May I make one other point, Your Honor, which I think it will not take as much time.

When we had the conference in Chambers with respect to the reports on Mr. Lautner's testimony, Your Honor followed the procedure set forth in Section 3500, that Your Honor would examine the reports and excise those portions which are not relevant to the testimony, and that, of course, is in accordance with Section 3500.

I simply wanted to state on the record at this time that it seems to us there is a constitutional question as to whether Section 3500 has fully carried out what the Supreme Court laid down in the Jencks case as being the requisities of due process. If there should be a conviction in this case, we might want to argue on appeal that this procedure laid down in the statute is not constitutional and does not com-
(tr. 679) pletely fulfill the requirement of due process.

We will be prepared to argue it to Your Honor here, if you wish, but at the moment all I wanted to say is to state for the record that we do challenge the constitutionality of that procedure under the Jencks case, and, therefore, take exception to the entire document not having been made available to us.

May I say again, of course, I am quite aware that Your Honor's action is in accordance with what the statute says.

THE COURT: That is the point I want to be certain your motion does concede, that the formula prescribed by the Act of September 2nd, 1957, has been followed here.

MR. TAYLOR: Yes, Your Honor. I don't have the exact language here, but—

THE COURT: The point you make is that the statute

itself does not—

MR. TAYLOR: Correct, yes, Your Honor.

THE COURT: — give the defendant all the right to which he is entitled, but you do not make the point that the statute has not been followed?

MR. TAYLOR: No, I do not. On that I just have one observation, but I am not going to insist on this at all. I just would like to inquire if it's feasible. I am informed that in the recent trial in Cleveland that same procedure that we have been following here was used, that is, that (tr. 680) the Government attorney submitted the records to the Judge with their suggestions on what should come out, that he reviewed those, and then gave the defense the results.

However, in Denver a slightly different procedure was followed; in Denver, the Government attorneys gave the defense at the outset the documents with the excisions already made, and simultaneously gave to the Judge the entire documents, and on this basis the defense was allowed to argue to the Judge whether certain excisions that they could see on their copies were proper or were interfering with the continuity, and so forth, before he had made up his mind.

Now I am not suggesting that Your Honor's mind would be closed, if we should come in and object to an excision and if this procedure is inconvenient for the Government. I am not going to insist on it here, but if it can be done that way, it seems to me, it is slightly preferable procedure and may more completely carry out what the statute had in mind.

If it can be done that way, it would be better, but we—and I am not going to insist on it.

THE COURT: Well, now, what actual difference is there in the two?

MR. TAYLOR: There is only this difference, that the defense sees the documents with the excisions before the Court has ruled whether or not the excisions are proper, and is thereby enabled to come in on the basis of the docu-
(tr. 681) ments with the excisions and say, We think this one is destroying the continuity; we think this one looks as if it would be relevant, and ask the Court to overrule those suggested excisions, and they are able to do that before the Court has already ruled that the excisions are proper.

THE COURT: Well, of course, you would have that same right here by asking a reconsideration after you had read the unexcised ones.

MR. TAYLOR: That is right. It simply means the difference between opportunity to argue about it before the Court reaches a decision or ask the Court to reconsider what he has already ruled on.

THE COURT: Well, just a difference in the practical application, I would think, it could be followed without any difficulty unless you gentlemen see some obstacle to it. If you do, why, we can confer on it again.

MR. KEENEY: How does this apply to the administrative markings?

MR. TAYLOR: Well, I think this would mean that

when you gave us the documents, you would have excised the administrative markings already. The copy that went to the Court would have the administrative markings on it, of course.

THE COURT: The only difference is the Court would not look at the excisions until the defense counsel had looked at the unexcised portions.

(tr. 682) MR. TAYLOR: Well, it is reverse. The Court would not look at the complete copies with the recommended excisions until the defense had seen a copy with the excisions already made and had had a chance to object to the excisions.

MR. WOERHEIDE: Your Honor, that would mean that we would have to make another photostatic set, which we would make up for Your Honor, besides the one that we would cut up for the defense counsel.

MR. TAYLOR: That is right.

MR. WOERHEIDE: And we don't have a spare photostatic set that we could use in that way, and I don't believe that we should be obligated to mark up the originals.

THE COURT: Well, I think I can reach the same result by not passing on the excisions until defense counsel had had a chance to read the documents, or that part of the document which is unexcised.

MR. TAYLOR: It may well be that we can work it out as a practical matter that way, and I don't want to put the Government to the burden of making another photostatic copy; that is not my intention.

THE COURT: I will work it that way, defer any ruling until you have had a chance to look at any such portions as are handed to you.

MR. TAYLOR: Thank you, Your Honor.

* * *

BABARA HARTLE, DIRECT EXAMINATION
(Continued)

(tr. 687) * * *

Q Mrs. Hartle, prior to the noon recess we were discussing the actions in which the Communist Party engaged while the Korean war was in progress, and as I recall your testimony you were referring to propaganda statements that were being made by the Communist Party during that period, and I ask you whether any statements were disseminated at that time by the Communist Party regarding the Commission of alleged atrocities by American soldiers who were fighting in Korea at that time?

MR. TAYLOR: Please Your Honor, may I ask what time, at what time?

MR. WOERHEIDE: During the Korean hostilities, Your Honor.

MR. TAYLOR: These lasted four years, Your Honor. You may make it more specific than that.

I object to the question as too vague, Your Honor; during the Korean War is too vague in point of time.

THE COURT: I think, if you can point it out, you can do it. If you cannot, I will allow the question.

(tr. 688) BY MR. WOERHEIDE:

Q Were such statements—I will rephrase the question, Your Honor.

In 1950 when the Korean War started and was in its first stages, did the Communist Party disseminate propaganda regarding the alleged commission of atrocities by American troops in Korea?

A Yes.

Q In 1951, Mrs. Hartle, when the Korean War still was in progress, did the Communist Party disseminate propaganda regarding the commission of atrocities by American troops?

A Yes.

Q In 1952—

MR. TAYLOR: I will ask, Your Honor, Mr. Woerheide be instructed to refrain from leading on every question; each one of these he has put words in the witness' mouth, and called for a yes or no answer, Your Honor, in 1952, did they thus and so.

THE COURT: Objection overruled.

BY MR. WOERHEIDE:

Q In 1952, Mrs. Hartle, while the Korean War still was in progress, did the Communist Party disseminate propaganda about the commission of alleged atrocities by American troops?

A Yes, it did.

(tr. 689) Q And in 1953, did the the Communist Party disseminate propaganda about the commission of alleged atrocities by American troops?

MR. TAYLOR: Your Honor, I will renew the objection as calling for the conclusion of the witness. He can

ask her what she observed, what she saw, but not for the conclusion on that.

MR. WOERHEIDE: I intend to go into the nature of this propaganda, Your Honor. First, I wish to lay the foundation.

MR. TAYLOR: I would ask that he get the facts and not the conclusion.

THE COURT: Objection overruled.

BY MR. WOERHEIDE:

Q Will you tell us what that propaganda was, Mrs. Hartle, please?

A The propaganda was by the Communist Party that the American soldiers in Korea were rivaling the atrocities committed by the Hitler soldiery in Europe. The statements were made in the Communist Party that soldiers who participated in the war in Korea would be brutalized as the soldiers of Fascism had been in Hitler Germany.

Q Did they say what kind of atrocities American troops were committing in Korea?

MR. TAYLOR: Your Honor, I will again object. The (tr. 690) question does not say—

THE WITNESS: No.

MR. TAYLOR: The question does not call for who said or give any specific specification as to time, place, or identity of the person making this statement.

THE COURT: What was the occasion of the statement you are inquiring about, Mr. Woerheide?

MR. WOERHEIDE: Well, I will withdraw that ques-

tion, Your Honor, and ask another question.

BY MR. WOERHEIDE:

Q This is a preliminary question, Your Honor.

Do you recall propaganda put out by the Communist Party during the Korean War period about the waging of germ warfare by American soldiers in Korea?

A Yes, I do.

Q What was that propaganda?

A The propaganda was that the American armed forces are using bacteriological warfare in Korea.

Q Do you recall any propaganda regarding bombing raids against civilian populations?

A Yes.

Q What was that propaganda?

A It was the propaganda that the Air Force was not trying to hit the military targets, but was trying to deci-
(tr. 691) mate the population of North Korea.

Q What means, if you know, Mrs. Hartle, were used by the Communist Party during the war to disseminate this type of propaganda?

A A number of means were used. Articles appeared in the Communist Party press, The People's World, the Daily Worker, Political Affairs, and other periodicals, in magazines, and were circulated, leaflets were issued by the Communist Party containing such points, and those points, speeches were made at meetings held by the Communist Party, where those things were said, those things were said in conferences by Communists and in trade union and mass organizations by Communists.

Q In this connection did the Communist Party organize any letter-writing campaigns?

A Yes. In that connection letter-writing campaigns were organized to the President of the United States, the State Department, and to Senators and Representatives of the United States Congress among others.

Q Were members of the Communist Party told what to say in these letters?

A Yes. On many occasions the postcards were printed by the Party Office or Section leadership in, on a mimeographed, so that only a signature was necessary in order to send it in. The political line of the Party to oppose the (tr. 692) Korean War contained the points that should be hammered home and brought home in opposing the war.

Q Mrs. Hartle, do I understand that you were Youth Director of the Party in the period of 1949, 1950?

A Yes.

Q What were your responsibilities as Youth Director?

A My responsibilities were to be in charge of the youth work of the Communist Party of the Northwest District. The specific organizational work that I was responsible for in order to carry out that program was to see that the leftwing youth organization, the Labor Youth League, is organized, to see that young people are brought into it, that it has a functioning staff of officers and that it is a functioning organization carrying on its program, to see that young people, young Communists, take part in the life of campus organizations on the University of Washington Campus, in particular, to see that young Communists are active in the Youth Council of the N.A.A.C.P., which is the National Association for the Advancement of Colored People, to see that youth committees are set up in the unions

and especially in the concentration unions, concentration industry unions, so that those unions would take up the youth program that the Communist Party was interested in. Those were some of the responsibilities.

* * *

(tr. 696) * * *

Q Now, Mrs. Hartle, directing your attention to the period about 1936, when, as I recall your testimony, you were Agitational Propaganda Director of the Section of (tr. 697) the Communist Party which had its headquarters in Spokane, Washington, do you recall at that time—I would like to strike that.

Who was the head of the Northwest District of the Party at that time?

A Morris Raport.

Q Do you recall an occasion when he came to Spokane and discussed with you Underground operations?

A Yes.

Q When was that?

A In 1936.

Q What happened at that time?

A At that time Morris Raport said that it was necessary for the members of the Section Committee of the Communist Party in Spokane to arrange with someone who was not known as a Communist to be able to stay at their home over night, or a few days, in the event it became necessary for the Section Committee members to leave their own homes in order to avoid arrest.

He said that if such places were prepared and directed us to prepare them, in the event some person were arrested

the word could be quickly passed, and if we had a place to go where we could stay without being observed, it could defeat a mass raid on the Communist Party by law-enforcement officers.

(tr. 698) Q Do you recall any action which you took at that time?

A Yes.

Q What was that?

A I spoke with a woman friend of mine and told her that I wanted a place where I could stay over night, or a few days, without making preparations ahead of time, that I could come in whenever I needed to and stay, and that my presence shouldn't be revealed and that I would stay as long as I needed to, and I did make such arrangements.

Q Did you ever have occasion to use these premises?

A Yes.

Q How did that happen?

A I was informed by the Section official, the Chairman of the Section, one day, that when I came from work that I was not to go home, but was to go to my special place, as it was called, and stay there until I received word to leave. I did stay there one night, and that was all.

MR. TAYLOR: May we be told when, Mr. Woerheide?

THE WITNESS: In 1936. I don't remember the month. It was 1936.

BY MR. WOERHEIDE:

Q Now directing your attention, Mrs. Hartle, to the period between 1939 to 1941, when the so-called Hitler-

(tr. 699) Stalin Pact was in effect, do you recall any discussion within the Communist Party at that time regarding possible Underground operations, techniques, methods?

A Yes.

Q Where did these discussions take place?

A They took place in meetings of the Communist Party in Spokane, Washington.

Q Who participated in these discussions?

A The leadership of the Spokane Section, and the Northwest District Chairman of the Communist Party from Seattle.

Q What was the substance of these discussions?

A The substance of these discussions was that a check-up had been conducted and a report was given that a number of small mimeograph machines had been placed in various homes along with paper and stencils and mimeograph ink, supplies needed in order to have the materials available to put out leaflets for the Communist Party in the event that the Daily Worker was shut down, or in the event that it became suspicious matter to, for anyone to go in and order a large amount of paper to print leaflets. Other, other matters that were discussed were that some precaution should be taken so that the authorities wouldn't know everything that the Communist Party was doing.

Some of these precautions were to be careful about (tr. 700) meeting places. The District Organizer informed us that he would not come into town and proceed as usual to a hotel, but would stay in someone's home and in someone's home that wasn't well known as a Communist, as he had done formerly.

Other precautions that were discussed were that in typ-

ing material, to put three or four pieces of blank paper on top of a carbon and then write through that on a sheet of paper. The reason for this being that it is difficult to trace what typewriter typing comes from when it is in a blurred carbon copy.

Another precaution discussed was that when burning material that one is through with and doesn't want to leave around, that it is not only necessary to burn the material but to smash the ashes, because ashes can be read by experts as to what it says on the paper. A number of such matters were discussed.

Q Were you told what to do about telephones?

A Yes, we were told that telephones can be tapped, and that a machine for listening to what is going on in the room can be put in a telephone and that it is best not to hold meetings in rooms with telephones, but if you do have to hold a meeting in a room with a telephone, the thing to do is either to put a heavy coat or a blanket over it, smother it, or to turn the radio on very low, which would mix up the sounds to the point where it would be difficult to take a re-
(tr. 701) cording of what was being said.

Q Were you told what to do about parking automobiles?

A Yes. We were told that automobiles should not all be parked in a row in front of a meeting place, a home, or a hall, that it is very easy for someone to take down all the license numbers and find out who was at the meeting, that cars should be parked aways away from a meeting place and members should walk a block or two or three to the meeting place.

Q Were you told what to do about keeping personal records?

A We were told at that time in that period to have the

minimum of records and to be careful with our records, not to carry names and addresses around.

Q Were you told about taking notes at meetings?

A Yes. We were told that notes should not be taken, that they could be lost, or that they could be found on a person.

Q Were you told anything about letting lights burn late at night?

A Yes. We were told that it was the knowledge of the Communist movement that Communists were sometimes detected in a neighborhood by the fact that they always seemed to have their lights on the latest of anyone else in the neighborhood, that people would wonder what was (tr. 702) keeping them up so late, and that the long meetings and discussions would have to be cut down, that meetings would have to start earlier and be more prompt in their execution, and that the members present at the meeting should depart promptly. However, we were instructed not to depart in a group, but to depart in ones and twos so that it didn't look like an exodus from a meeting.

MR. WOERHEIDE: Your Honor, I got into my proof on this Underground question a little bit prematurely, and I would like to leave off at this moment, at this particular point, which was back in the early forties and take it up a little bit later. I will not repeat the same testimony, Your Honor.

* * *

(tr. 704) * * *

Q Mrs. Hartle, I show you Government's Exhibit for identification No. 36, which is the June, 1950, issue of Political Affairs, and I ask you if you can identify this document?

A Yes.

Q Was that an official publication of the Communist Party?

A Yes. This is the official theoretical organ of the Communist Party of the U.S.A.

MR. WOERHEIDE: Your Honor, I ask that this issue of the magazine be received in evidence.

THE COURT: Let it be admitted.

(The Clerk so marked the pamphlet entitled Political Affairs, June, 1950, as Government's Exhibit No. 36 in evidence.)

MR. TAYLOR: Usual objection, Your Honor.

BY MR. WOERHEIDE:

Q Mrs. Hartle, I direct your attention to an article by William Z. Foster, starting on page 14 of this exhibit, entitled People's Front and People's Democracy, and I will read you the following quotation from page 20 of this article:

> But regardless of tactical variations that may be necessary as the class struggle proceeds, the road to socialism remains the same through the defeat of the (tr. 705) capitalist class and the establishment of the dictatorship of the Proletariat.

(The exhibit was handed to the witness.)

Mrs. Hartle, what was your official position at the time this publication came out?

A I was the Educational Director of the Northwest District of the Communist Party.

* * *

(tr. 707) * * *

Q Mrs. Hartle, I think the pending question is. Will you explain to the jury what this statement conveyed to members of the Communist Party who read it in Political Affairs.

A This statement meant that regardless of whether the Communist Party is supporting a third party or the Progressive Party or a former Labor Party, or a United Front Coalition, regardless of the politics that the Party takes part in to bring forward the day-to-day program of the Party, like rents and housing and wages and Negro rights and women's rights, regardless of the Party support of that type of government, which is a tactic, that the road to socialism remains the same, that this is, that these types of governments—supposing the Progressive Party would get into the government and be a Progressive Party president and vice president and cabinet and a majority in the Congress and in office throughout the country, that the party (tr. 708) that is then in power, that, would not change the road to socialism. This is a tactic on the way to socialism.

To organize and unite the working class and its allies and tell them how to fight and keep up the democracy, open up all the democratic avenues for this program, but the road remains the same—through the defeat of the capitalist class, and the establishment of the dictatorship of the Proletariat.

Through the defeat of the capitalist class means through the forcible overthrow of the capitalist class, through the smashing of the Bourgeois state machine, through the—

which means through wrecking or disbanding or suppressing any organ of the Government which could stop the revolution, and the new revolutionary government from coming in, and establishment of the dictatorship of the Proletariat means after the Bourgeois state machine, the police, the courts, the prisons, the army of the old class have been liquidated and new ones set up, the dictatorship of the Proletariat means becoming the Government and exercising the power of state themselves, against the old class or suppressing the old class to prevent it from coming back into power and making a counter-revolution, and, in brief, the article means to Communists that, let us not confuse a people's front or a united front, or a democratic front, or (tr. 709) an anti-imperialist front government with a dictatorship of the Proletariat because they are not the same thing. They are the, one will help to get to the other, but they are not the same thing.

* * *

(tr. 712) * * *

Q Mrs. Hartle, did there come a time when the National Headquarters of the Party issued certain instructions to the lower echelons of the Party regarding the subject of Titoism?

A Yes.

THE CLERK: No. 37.

(The Clerk so marked the pamphlet entitled Struggle Against The Tito Fascist Agents of Imperialism as Government's Exhibit No. 37 for identification.)

BY MR. WOERHEIDE:

Q Will you tell the jurors, Mrs. Hartle, what the term

Titoism means?

A Titoism means following the lead of Tito, of Yugoslavia, and in the Communist Party it means a deviation from Marxism-Leninism, an abandoning of Marxism-Leninism.

Q Mrs. Hartle, I show you Government's Exhibit No. (tr. 713) 37 for identification, and I ask you if you can identify it?

A Yes. This is The Struggle Against the Tito Fascist Agents of Imperialism, and it's a study outline that was sent to the Northwest District by the National Education Department for use in classes and educational work and propaganda work of the Party.

Q Is there a program of action set forth in that outline, Mrs. Hartle?

A Yes, there are. There is a program of action in here.

MR. TAYLOR: Mr. Woerheide, so there will be no confusion in my mind, could you find out when this was sent to the Northwest District?

MR. WOERHEIDE: When was it sent to the Northwest District, Mrs. Hartle?

THE WITNESS: In 1949.

BY MR. WOERHEIDE:

Q Will you tell us what the program of action outlined by the Party was with respect to Titoism?

A The program of action was that the Marxist-Leninist Party, Communist Party itself, must have a full grasp of the significance of what Titoism was, that it was an alien ideology, that it was Bourgeois nationalism, that it was a

theory that played into the hands of American imperialism and the State Department particularly, and that it was (tr. 714) aimed specifically against the Soviet Union, and after it, that was part of the program, to make certain that the Communist Party itself would understand what that theory was, what Titoism was.

It was said further that Titoism is the Trotskyism of this period in history.

The other steps in the program were that this understanding of what Titoism is must be brought to the labor and Progressive and mass people's movement through the Party members in there, and to explain and convince to the workers and people that Titoism is the maneuver on the part, in the first place, of the United States State Department to try to foment a war against the Soviet Union, that the State Department was hatching up a plot to attempt to secure Yugoslavia as a base of operaions to launch such a war against the Soviet Union, an imperialist war against them.

It was—Part of a program of action was, to issue leaflets and explain this Titoism in the course of doing other work, so that the people will recognize Titoism as being very dangerous to the working class, really aimed at them, aimed at the peace of our country and is a very bad thing in general.

Q Mrs. Hartle, how were these statements with respect to Titoism to be brought to the attention of the members of trade unions and to the members of these mass organizations?

(tr. 715) A Well, they were to be brought to the attention of trade unions in a number of ways. One of them is to have Communist Party members in the trade unions get up and talk about it, connect it with some feasible issue.

where it seemed to fit in quite well.

Another way was to issue the Communist Party press and leaflets and distribute them to trade unions at their plants and in their working class neighborhoods, and to hold mass meetings in the name of the Communist Party where they could come and hear about it, and to speak of Titoism in broader mass meetings and conferences organized by other organizations, not in the name of the Communist Party, such as, the Washington Pension Union, and explain it there in a number of such avenues.

MR. WOERHEIDE: Your Honor, I ask that Government's Exhibit No. 37 be received in evidence.

MR. TAYLOR: Same objection.

THE COURT: Let it be admitted.

(The Clerk so marked the pamphlet entitled Struggle Against The Tito Fascists Agents of Imperialism as Government's Exhibit No. 37 in evidence.)

MR. WOERHEIDE: Your Honor, excuse me.

BY MR. WOERHEIDE:

Q Mrs. Hartle, I show you Government's Exhibit No. (tr. 716) 29 in evidence, and I ask you if you can recognize this document?

A Yes. This is an outline concerning concentration work of the Communist Party which was sent by the National Education Department to the Northwest District of the Communist Party for use in Schools, classes, club discussions, and in other ways.

Q When was this exhibit distributed throughout the Communist Party, Mrs. Hartle, to your knowledge?

A In 1949.

Q Did you receive copies of it at that time?

A Yes.

Q Did you receive instructions concerning the use of this document?

A The instructions were general for the outlines, specific instructions are contained in the outline itself.

Q Is there a program of action set forth in that outline, Mrs. Hartle?

A Yes.

Q What is the program of action with respect to industrial concentration?

A The program of action is that that is outlined here, is in quite detail of how to organize the concentration policy of the Party, to build shop and industry clubs, to utilize the work of neighborhood clubs, to support the work of the concentration industry policy, to select the shops for con- (tr. 717) centration and have certain clubs concentrate on certain shops, to see that, to train members of the Communist Party for concentration work, so that they will be familiar with the industry and the union and will be able to carry on more effective work when they go into that industry; matters of that kind.

* * *

BY MR. WOERHEIDE:

Q Mrs. Hartle, just before the recess we were going into the matter of concentration work. Did there come a time when you received a concentration assignment from

the Party, Mrs. Hartle?

A Yes.

Q When was that?

A In around the middle of 1947.

Q Thereafter for how long a period did you engage in concentration work?

A I engaged in it for a period of three years, three years.

Q That would take you through—

(tr. 718) A About the middle—

Q 1950?

A Middle of 1950, yes.

Q Mrs. Hartle, what was your concentration assignment?

A It was to recruit workers out of the aircraft industry specifically, the Boeing Airplane Company Plant in Seattle, Washington.

Q Was the Boeing Company, to your knowledge, a plant which did classified work for the United States Government?

A I don't know that I can testify to my knowledge. It was common knowledge.—

MR. TAYLOR: I believe the answer has been completed. If the witness says she doesn't know, Your Honor —now she's volunteering additional information.

THE COURT: Is that the purport of your answer, that you do not know?

THE WITNESS: No, it is that I don't know of my own knowledge because I did not work there, or I was not part of the Boeing Company.

MR. TAYLOR: Renew the objection for anything further, Your Honor.

MR. WOERHEIDE: Was there any discussion within the Party circles with which you were associated regard-
(tr. 719) ing the type of work that was done at the Boeing Airplane Plant?

THE WITNESS: Yes.

BY MR. WOERHEIDE:

Q On what level were these discussions held, Mrs. Hartle?

A They were held on the District and Regional level, and also the Club level in the Aircraft Concentration Region.

Q Were there discussions with the top leadership of the Party in the Northwest District?

A Yes.

Q With Mr. Huff?

A Yes.

Q Mr. vanLydegraf?

A Yes, v-a-n, L-y-d-e-g-r-a-f.

Q When were these discussions held, Mrs. Hartle?

A At the—were held during the period of 1947 to 1950.

Q With respect to the type of production which the Boeing Plant was engaged in, what was said in the course of these discussions?

A It was said that they were manufacturing bombers and war material.

Q What was the objective of the concentration program

with respect to the Boeing Plant, Mrs. Hartle?

A The objective of the concentration work was to recruit (tr. 720) Boeing workers into the Communist Party and to influence the Boeing workers and their union, the Aeronautical Mechanics Union of the Machinists International, in a direction that the Communist Party wanted that union to take.

Q Was activity engaged in by the Communist Party to attain these objectives of the Communist Party with respect to the Boeing Plant, Mrs. Hartle?

A Yes.

Q What was that activity?

A The activity was to contact Boeing workers in order to get acquainted with them, and to try to find among them persons who might be sympathetic to the Party and who might be material for recruiting into the Party. The activity was for groups of two, two Party members in the Region to find the home addresses of a number of Boeing workers out of the City Directory and to visit them one by one, taking certain literature along, sounding them out, trying to find out which ones should be followed up, might be amenable to being recruited into the Communist Party.

Other activity was to mail to large numbers of Boeing workers a Party leaflet, pamphlet, and periodicals and newspapers. Other activities was to distribute the special editions of the Northwest edition of the People's World to the workers as they came out of the Boeing Plant, or to leave them on their cars, so that when they got in their cars to (tr. 721) go home, they would find this material there.

Other activity was to hold street meetings in some intersections in the areas where many Boeing workers lived, such as, the housing projects that were in the more or less immediate area of the Boeing Airplane Company, and a

number of such actions were carried out.

Q Mrs. Hartle, were any special precautions taken with respect to the size of the club or branch units which were formed from the recruits among the Boeing workers?

A Yes.

Q What were those special precautions?

A The Boeing workers themselves who were still working in the plant, and some of those who had been fired out of the plant, and were still attempting to get back in, were organized in a, simply under ground fashion. They were organized in groups of one, or two, and sometimes three, and they were contacted, each group was contacted by an official of the Aircraft Section separately so that the Boeing workers in there would not know each other in the event that any one of them was an F.B.I. agent and could identify the rest of them.

Q Mrs. Hartle, besides the aircraft industry in that region, were there any other industries which were a target for concentration work by the Communist Party, to your knowledge?

(tr. 722) A In the State of Washington the Communist Party concentration industries were lumber, maritime, and aircraft. In some of the Sections of the Communist Party in the State of Washington there were additional concentrations. In Spokane, Washington, where there is no maritime industry and no aircraft, besides the state-wide lumber concentration, the concentration was railroad, inasmuch as that is a railroad center.

In the City of Tacoma, where there is also a large railroad population, one of the concentrations was also railroad.

Q Mrs. Hartle, did the Communist Party in its concen-

tration work, work up separate plans for the separate industries?

A Yes.

Q Who worked up those plans, Mrs. Hartle?

A The plans were, the plans for concentration work in each concentration industry, were worked up by the District leadership of the Communist Party, the District officers, and were also taken up by the District Board and District Committee of the Communist Party.

Q Were these plans worked up pursuant to instructions received from the National Headquarters of the Party?

A Yes.

Q Did the Party from time to time conduct an inquiry to ascertain the success of its concentration work?

(tr. 723) A Yes. The periodic check-ups were made to see that the goals in recruiting and literature and other matters were proceeding as was wanted.

* * *

(tr. 724) * * *

Q Mrs. Hartle, I have asked you previously about plans and discussions regarding Underground operations in the period around the year 1936 and again around the year 1939 to '41. I now ask you if there were similar discussions about the period 1947?

A Yes.

Q How did this come about?

A In 1947 we had a District Committee meeting. One of the subjects of that meeting was a factional dispute be-
(tr. 725) tween the District Organizer and another officer of the Party.

One of the subjects of that meeting was a report that Henry Huff gave upon returning from a meeting of the

National Committee of the Communist Party in New York. In this report he reported that William Z. Foster had spoken as the main speaker in the National Committee meeting, and he had reported that the Underground during World War II in Europe had been successful for several reasons, the Underground of the Communist Party, that the reasons were that they had organized themselves in groups of three, no larger than a group of three, and that the work of the Communist Party was divided in this group of three, between a political leader, an organizational leader, and a mass trade union leader.

And that the second reason why the Underground was successful was that the Party had learned in their experience there that the key thing about being successful underground was to be sure that you were not followed, and that in the event you thought you were being followed, by someone who might be trying to investigate you or apprehend you, that you would immediately cease activity and not make another contact with another Communist, and that by pursuing this policy the Underground had been very successful and the minimum number of persons had been found out to be in the Underground.

Q Now, Mrs. Hartle, in the following period were there (tr. 726) any changes made within the structure of the Communist Party as regards the size of groups within the Party?

A Yes. In the 1948 period there was again a reduction in the size of the Branches from possible twenty-five or thirty members to about fifteen members, and there was a breaking up of the Branches into Groups, smaller groups yet, of two, three, and not more than five, with the Group leader of each Group who supposedly, at least, was the only one who knew that they were in the Group.

Q What was the purpose of these changes in the size of the Groups, Mrs. Hartle?

A The purpose of the change was that if an F.B.I. agent or any other person in the government was interested in finding out who the Communists were, that one agent would find out the minimum number of Communists with the maximum amount of effort on his part.

Q Do you recall whether corresponding changes were made on the National level of the Party?

A Corresponding changes were made in that the size of the National Committee was cut approximately in half, in the National level.

Q Now, do you recall an occasion when a woman named Dorothy came to Seattle?

A Yes.

Q When was that?.

(tr. 727) A That was in the winter of 1949 and '50.

Q Did you meet this woman?

A Yes.

Q Who introduced you to her?

A Henry Huff.

Q What did he say at that time?

A He said that the woman he was introducing me to was not named Dorothy, but that I should call her that, that she had another name. He said to me, not while he was introducing me, but on another occasion, that she may be Ann Silver. He said that she had been sent from the National Headquarters of the Communist Party for the purpose of organizing Underground work, and that I should work with her and lend her all possible assistance so that she could accomplish the program that she had come out there to accomplish.

Q Did you thereafter work with her, Mrs. Hartle?
A Yes, I did.

Q What happened while you were working with her?
A While I was working with her, we set up a part of an Underground apparatus. We set up a person who could travel as the representative of the District as a courier from the District Headquarters, and to get in contact with the National representatives of the Party wherever he might be sent. A courier between the District and the (tr. 728) National Communist Party.

We set up a place where a person could come who was coming from the National Headquarters, a point of contact where he could walk up to a door and knock and give a password and from there on make contact with the local officials of the Party so that he would not have to come to an office or to the home of a Communist Party leader. And we set up a place for such a person to stay for a week or two, or even for several months, if necessary, some home without small children in it, where he could have a room by himself, and where he could stay, could work and write or do whatever he needed to do and remain unknown in the neighborhood and to anyone else.

And we set up a person to operate a lithograph machine that could print a paper, to take the place of the Daily Worker, if it were suppressed, and we had to set up a person that could do photography and we did find a photographer who was willing to take that assignment.

We were supposed to set up some more, but that's about as far as we got, as I recall.

Q Was anything done about mail drops and bundle drops?
A Well, we were supposed to set up a number of mail

and bundle drops; but she had to leave the area and I was supposed to do it later, and I also left, so that's as far as (tr. 729) my knowledge goes on the mail and bundle drops that we were supposed to set them up, but I don't know that they ever were.

Q When Dorothy left, did she leave any instructions for you?

A Yes. Her instructions were that I should continue every, continue setting up these mail and bundle drops, and some other things that she wanted done along these lines.

Q Do you recall any discussions among Huff, the District Organizer, Dorothy, and yourself, regarding the types of person you needed for work in this Underground activity?

A Yes. The discussion was that Dorothy said that for these Underground persons we needed persons who were highly reliable, tested and loyal to the Party, but we needed persons who were not known at all as Communists, who were not even on any subscription lists of the Daily Worker or People's World or even of such magazines as Freedom that Paul Robeson put out, and other things that might lead to somebody suspecting they were in any way connected with the Communist Party.

And Henry Huff said that in our District he didn't know how that could work, but the persons who were loyal and tested out there were persons who had participated in the Communist Party work and activities and in the trade unions and mass organizations, and that he thought it would be very difficult to find tested and reliable people (tr. 730) who had been that far, so far in the background.

However he said that inasmuch as that was the requirement from the National Headquarters, that he, we would

have to do the best we could and find the very best we could to meet those requirements.

Q Mrs. Hartle, do you recall during the period 1949 and 1950, early 1950, any discussion on the staff and Board level regarding money in connection with Underground activity?

A Yes.

Q Where did these discussions take place?

A These discussions took place in the staff and in the District Board meetings, the staff meetings being meetings of the full-time officers in the office who usually meet in the daytime before Board meetings, and the discussions were that it was necessary to build a larger reserve of funds for Underground work. And the discussions included that we had received instructions persistently from the National Headquarters that such reserve of funds must be set up. the funds to be set up would be necessarily large because it would entail the expenditure of money to keep an Underground apparatus going, and the discussion was that the very immediate need for the District was a twenty or thirty thousand dollar fund to be raised and set aside.

Q In these discussions, Mrs. Hartle, was anything said (tr. 731) regarding the purpose of these Underground operations?

A Yes.

Q What was said, please?

A It was said that the Underground operations were for the purpose of protecting the Party against the surveillance and arrest by government authorities and that the sending of people underground was for the purpose of replacing Party leaders who might be arrested.

Q Was anything said about this time as regards send-

ing any officials of your District underground?

A Yes, there was.

Q When was this subject first broached?

A Around the first and middle part, around the first part of 1949, was first broached.

Q Where did these discussions take place, on what level?

A They took place in the District staff and District Board.

Q What was said in the course of these discussions, Mrs. Hartle?

A In the course of those discussions in early 1949 it was discussed that it might become necessary for the Chairman of the District and the Secretary of the District to go underground. It was further discussed around that period that my assignment should be changed from that of Aircraft (tr. 732) Concentration Chairman to that of District Educational Director so that there would be more personnel in the District Office in the event that the top leaders of the Party had to go underground.

Q Mrs. Hartle, did there come a time when you, yourself, received an actual Underground assignment?

A Yes.

Q When was that?

A In July of 1950.

* * *

(tr. 793) * * *

Q Now, Mrs. Hartle, directing your attention to the period from the reconstitution of the Party in 1945 until the time when you finally left the Communist Party, I ask you the following questions. Please answer this first question yes or no.

Were you taught concerning the State as an instrument of oppression?

A Yes.

Q Where were you so taught?

A I was so taught in the National Training School in 1946.

Q My next question is again to be answered yes or no, Mrs. Hartle.

MR. TAYLOR: Your Honor, I suggest that is an improper—the witness should answer as she feels to be accurate and truthful and not in the form prescribed by the (tr. 794) Prosecuting Attorney.

MR. WOERHEIDE: I am attempting to lay a foundation, your Honor.

THE COURT: Objection overruled.

BY MR. WOERHEIDE:

Q Did you teach and supervise teaching by others, concerning the State as an instrument of oppression?

A Yes.

Q Where and when?

A In schools and classes in Seattle between 1945 and 1950.

Q Was the teaching given and supervised by you in this respect, the same as the teaching which you received?

A Yes.

Q What was the teaching, this teaching in the Communist Party regarding the State as an instrument of oppression?

A I was taught that the State is an instrument of op-

pression of one class over another class. In capitalist society which we have today the State is the instrument of oppression of the capitalist class over the working class.

Q Mrs. Hartle, during this period were you taught concerning the class struggle?

A Yes.

Q Did you teach and did you supervise teaching con-
(tr. 795) cerning the class struggle?

A Yes.

Q Was the teaching given and supervised by you in this respect the same as the teaching you received?

A Yes.

Q What was this teaching in the Communist Party regarding the class struggle?

A The teaching regarding the class struggle was that there are two main classes in society which are inevitable and there is irreconcilable class struggle which ranges at a very high pitch at times, is sometimes modified at other times, but that this class struggle, this clash between classes goes on constantly.

Q Mrs. Hartle, at this time were you taught concerning the role to be played by the Communist Party in the class struggle?

A Yes.

Q Did you teach and did you supervise teaching by others concerning the role to be played by the Communist Party in the class struggle?

A Yes.

Q Was the teaching given and received—I am sorry—I will start the question over.

Was the teaching given and supervised by you in this

respect the same as the teaching you received?

(tr. 796) A Yes.

Q What was the teaching in the Communist Party as to the role to be played by the Communist Party in the class struggle?

A The teaching in the Communist Party regarding the role of the Communist Party in the class struggle was that the Communist Party leads the class struggle of the working class, that it leads the working class in the class struggle to prepare for taking power, that it leads the working class in seizing power, leads the working class in smashing the old Bourgeois state machine, and it leads the working class in establishing the dictatorship of the Proletariat, which is the new state machine, and that it is the instrument of the dictatorship of the Proletariat for maintaining it.

Q Mrs. Hartle, during the period which I have mentioned were you taught concerning the ultimate goal of the Communist Party in the class struggle?

A Yes.

Q Did you teach and did you supervise teaching by others concerning the ultimate goal of the Communist Party in leading the class struggle?

A Yes.

Q Was the teaching given and supervised by you in this respect the same as the teaching you received?

A Yes.

(tr. 797) Q What was the teaching in the Communist Party regarding the ultimate goal of the Communist Party in the class struggle?

A The teaching regarding the ultimate goal in the class

struggle was that that ultimate goal is the dictatorship of the Proletariat. The teaching further was that it was for the purpose of organizing a Socialist society, but the goal of the class struggle as taught by the Communist Party is the dictatorship of the Proletariat.

Q Mrs. Hartle, were you taught concerning the means whereby this ultimate goal of the Communist Party was to be attained?

A Yes.

Q Did you teach, and did you supervise teaching by others concerning the means whereby this ultimate goal of the Communist Party was to be obtained?

A Yes.

Q Was the teaching given and supervised by you in this respect the same as the teaching you received?

A Yes.

Q What was the teaching in the Communist Party concerning the means whereby the ultimate goal of the Communist Party was to be attained?

A The teaching regarding the means by which the ultimate goal might be attained was that those means would (tr. 798) be forcible. The teaching was that any teaching, any theory of a peaceful road to socialism, or a growing over from capitalism to socialism was a betrayal of the working class and that the Communist Party leading the working class would have to arm if in the first place with the theory that the workers must know and must be prepared to know that they can only take power forcibly.

Q Mrs. Hartle, in this respect, I will read to you a passage in Government Exhibit No. 17, a letter to American workers; the passage appears on page 16.

"For the class struggle in revolutionary times has always inevitably and in every country taken on the form of civil war, and civil war is unthinkable without the worst kind of destruction, without terror, and limitations of formal democracy in the interest of war."

Mrs. Hartle, I ask you if this passage was taught to you in the National Training School that you attended in 1946?

A Yes, it was.

Q Is this passage set forth in quotation marks in the notes that you made at that time?

A Yes, it is.

Q Mrs. Hartle, during the period in question were you taught concerning action which members of the Party should take in preparation for attaining the ultimate goal of the (tr. 799) Communist Party?

A Yes.

Q Did you teach and did you supervise teaching by others concerning action which members of the Communist Party should take in preparation for attaining the ultimate goal of the Communist Party?

A Yes.

Q Was the teaching given and supervised by you in this respect the same as the teaching you received?

A Yes.

Q What was the teaching in the Communist Party concerning action which members of the Communist Party should take in preparation for attaining the ultimate goal of the Party?

A The action that Communist Party members should take in preparing for the ultimate goal that I was taught

and that I taught, were to build the Communist Party as the vanguard party of the working class, a theoretically equipped party, equipped with the theory of Marxism-Leninism, a highly organized party that could act as a unit, as a monolithic whole, with democratic centralism, the principle guiding it, that it will be, act as a unit, and features of, other features of a vanguard party, and that the Communist Party should be the connection between the vanguard and the working class millions in this preparation by working with and winning the confidence of the working (tr. 800) class and allies of the working class, such as, the Negro people, the poor farmers, other national groups, and in this way, in the course of struggle, constant struggle taking the forms of strikes and demonstrations and picket lines and marches and various kinds of activities to train the working class and the people for revolutionary battle.

Q Mrs. Hartle, during the period in question were you taught concerning when the final revolutionary struggle led by the Communist Party to seize control of the state by force and violence would occur?

A Yes.

Q Did you teach and did you supervise teaching by others concerning when the final revolutionary struggle led by the Communist Party to seize control of the state by force and violence would occur?

A Yes.

Q Was the teaching given and supervised by you in this respect the same as the teaching you received?

A Yes.

Q What was the teaching in the Communist Party concerning when the final revolutionary struggle led by the Communist Party to seize control of the state by force and violence would occur?

A I was taught that that moment in history would occur at a time when both the subjective and objective conditions are ripe at the same time, that the objective conditions would (tr. 801) be a revolutionary situation in which the old working class is no longer able to rule in the old way, and when the economy of the country is no longer able to meet the needs of the people, and that the subjective condition was that the working class follows the Communist Party.

* * *

## BARBARA HARTLE, CROSS-EXAMINATION

(tr. 841) * * *

Q Mrs. Hartle, at the noon recess I had been asking you (tr. 842) about the various actions undertaken by you in the Communist Party during these years that you were a member. Did you have an opportunity over the luncheon recess to think of any new or additional actions that you haven't mentioned yet?

A During the years 1945 to 1947?

Q Any time from 1940 to 1947—or—yes.

A Yes.

Q Good. Will you tell us what those are?

A In the 1947 period I don't recall now quite what I had testified to, as to what those actions were. I may repeat some of it.

In the 1945 to '47 period were held a large number of mass meetings of the Communist Party.

Q Hmn.

A There was a great deal of organizational work went into guaranteeing that these would be very large, impressive meetings; during that time there were organized large

distributions of Communist Party literature, and Communist Party Press; during that period 1945 to '47 there was organized a demonstration against the State House Un-American Activities Committee, the State House Un-American Activities Committee.

Q Canwell Committee?

A The Canwell Committee was the committee of the Legislature that was to investigate subversive activities in that area, and a demonstration was organized through the (tr. 843) Washington Pension Union and labor and progressive organizations for the purpose of having such a large picket line that it would stop the operations of the committee.

Now this was held in front of the Armory Building in Seattle, Washington, and during that period there were many conferences on issues that were of interest to the workers at that period, on the question of reconverting the wartime industries to peacetime industries; there were meetings there that discussed the conversion of the Boeing Aircraft Company from making aircraft and bombers to the possibility that they could manufacture automobiles or washing machines, and this referred also to what could be done in the shipyards in place of to construct ships for peaceful use, instead of the war ship, repair and construction that had taken place there.

Q Merchant ships?

A Yes, and there were a number of activities of a similar type that I'd mentioned before during that time.

Q Now coming to the period 1948 to 1950, or late 1947 to 1950, and by 1950 I mean July, when you left Seattle, I think I had asked you just when the noon recess came, whether you served during that period as Organizer of

South King County; is that correct?

A Yes, during part of that period I was Organizer of the Aircraft Concentration Region in South King County, and from 1949 to about the middle of 1949, to the middle (tr. 844) of June, 1950, I was the Educational Director of the Party and had some other assignments, too.

Q Those two positions were held not at the same time but one after the other?

A One after the other.

Q And in addition to those two positions you were still on the District Board and the District Committee?

A Yes.

Q And any others that you recall before July, 1950, or is that all?

A I was at that time a member and Chairman of the Northwest District Negro Commission, and I was responsible to the State Board for the direction of the literature work in the Party Book Store.

Q Now would you tell the jury—

A And the Youth Director.

Q Youth Director?

A Yes.

Q Would you tell the jury during this period and in those capacities for the Communist Party what activities and actions on behalf of the Party you engaged in? To save time, if you want to say if there are any new activities other than those that you mentioned, that would answer my question.

A There were similar activities to a number of those I have mentioned, such as public meetings, circulation of liter-
(tr. 845) ature, circulation of press, educational activi-

ties, organizing of schools and classes, and that type of activity.

In that period one of the actions that I engaged in during that time was through the Northwest District Negro Commission, building the National Negro Labor Council in that area, which meant building a new organization, and trying to get it launched, and on its feet, and to carry out an active program for Negro rights in the basic concentration industries, and, in general, and in that capacity also some of the actions organized were to organize picket lines around a grocery store at 14th and Jefferson, in order to force the owner of that store to hire a Negro employee, which picket line continued until he did do so.

There were similar picket lines on Safeway Stores and some other stores in the Duwamish Bend area, to secure such employment.

Actions in the youth field were to build, not to start, because it was started, but to revitalize and to strenuously build the Labor Youth League and—

Q Can I interject to ask whether that was one of these mass organizations, or front organizations that you speak of?

A Well, it was a youth organization of the Communist Party. It was organized by the Communist Party.

Q You regard it as one of these mass organizations (tr. 846) you mentioned, or front organizations?

A Well, it is not quite in the same category as, say, the Washington Pension Union, or the trade unions, because the Communist Party did start the Labor Youth League from the ground up, whereas these other organizations had some start and program before the Communist Party

worked in them and gained control in them. Some of the trade unions.

During that period was organized the demonstration of youth at the Canadian Border, where the whole Communist Party supported it. A large meeting was held of Canadians and Americans in what was called a peace meeting, and one of the actions that was organized there was to send a telegram addressed to the youth of Nagasaki and Hiroshima, pledging to them that the American youth would not drop another atom bomb in it, that the American youth would work to see that the United States would never drop another atom bomb. The Canadian youth did not participate in this. This was done by the American youth, and participants in that demonstration.

Another action in that period was through the Communist Party and in working with the Civil Rights Congress, was to organize a continuous picket line on the United States Court House in protest against the trial of the Communist Party leaders, National Communist Party leaders. The action was, that was organized by the Party, that each region of the Party in turn would take a certain day, and (tr. 847) the Civil Rights Congress would take a day to mobilize people for the picket line, to have a continuous picket line going for, during the period of those trials.

During the, in the—

Q Mrs. Hartle, excuse me—

A During the 1948 period, the actions of the Communist Party were the—and just a little before that—were the founding of the Progressive Party and the whole campaign of getting a Progressive Party organized and on its feet, and its candidate out in the field, and as many elected, campaign to elect as many as possible.

Those are some of the activities that I can think of.

Q And were you still engaging in raising funds and recruiting members and that sort of activity, that you had been on all along?

A Yes. There was one additional activity at that time that I have mentioned in my testimony before, and that is the organizing of a special underground apparatus; quite a lot of time and attention went to that.

Q Yes. You mentioned at the very beginning of your testimony about this period your work as an organizer of South King County. You gave that some other name, something about the Boeing.

A It was the Aircraft Concentration Region.

Q Oh, yes.

(tr. 848) Now was that an effort to recruit Party members in the Boeing Aircraft Works?

A Yes.

Q When was that begun, Mrs. Hartle?

A That was begun in the work of trying to recruit Party members out of Boeing's, had been in progress in the Seattle area from the time that I first came to Seattle, the recruits—

Q Since 1942?

A Yes.

Q Now was there a strike at the Boeing factory some time shortly after the war?

A Yes, there was.

Q Do you remember when?

A As I recall it happened either in the late, latter part of 1940—probably in 1946. That is as close as I can recall. It was probably in the latter part of 1946, or, at best, in

early 1947.

Q Did you mention a Communist club with, I think, the name Hal Spring Club that was out there?

A Yes.

Q Was that, was that the club in which the recruitment effort in the Boeing factory were concentrated.

A Well, the Hal Spring Club was the name of the setup we had for the Boeing Workers, the active Boeing work-
(tr. 849) ers or those that hoped to get back into the plant. or we hoped they would get back in, were organized in small groups of two, or one or three.

There were in addition to that—

Q Well, I am sorry. I meant to ask you about this, this Hal Spring Club.

A That's what I am talking about.

Q Oh, these people were all in the Hal Spring Club?

A That's all in the Hal Spring Club. That was called the Hal Spring Club, and there were in addition to that a group of persons who had formerly worked in Boeing's, who had no hopes, who'd been fired out of there, and had no hopes of getting back in there, and there were in addition myself and one or two others who were assigned to the work in that club, where a club did meet of some probably twelve persons, who met, in a regular branch meeting of the Hal Spring Club, but attached to them through the group system of these people were some of the others.

* * *

BARBARA HARTLE, RE-DIRECT EXAMINATION

(tr. 920) * * *

Q Mrs. Hartle, you testified on cross-examination re-

garding activity of the Party in forming a picket line about the year 1947, which was intended to disrupt and cause a break-up of sittings that were being conducted by committee of the state legislature?

A Yes.

Q Do you recall, incidents during the period of the thirties, when the Communist Party in the Spokane area seized a public building in the City of Spokane and held it for a substantial period of time?

A Yes.

Q When was that?

A It was in about 1936.

Q Will you tell us how that happened.

A In 1936, the unemployed movements in Spokane, through which the Communist Party was working, had or-
(tr. 921) ganized what they called a hunger march on the county, City Building. The announced objective of this hunger march was to obtain more relief. The hunger march was organized in this fashion, that the Communist Party and the unemployed organization flood the whole building and moved into the County Building and set up stoves and tables and groceries and they slept and cooked and stayed in there day and night for about six weeks, and there were, meetings were held on the steps.

There were broad steps inside the building and meetings were held there where speakers would speak and then entertainment was provided, and this took place in Spokane in 1936.

Q For that six-weeks period the County Building was in the hands and under the control of the Communist Party, Mrs. Hartle?

A Yes.

Q As an official of the Communist Party, did you know of a similar incident in the City of Seattle?

A Yes, I do.

Q Mrs. Hartle, do you have knowledge of the Party developing what were called jamming techniques?

A Yes.

Q Will you explain to the jury, please, what the jamming technique was and how it operated?

MR. TAYLOR: Your Honor, I am going to object to (tr. 922) the form of the question. I don't know whether I will object to its going outside the scope of cross, or not, because I don't know where or when or anything about this jamming technique. If the question is made more specific I can determine whether to object further.

MR. WOERHEIDE: Tell us when this jamming technique was developed.

THE WITNESS: It was developed around 1936, around that period.

BY MR. WOERHEIDE:

Q Where was it used?

A Spokane.

Q In what place was it used in the City of Spokane?

A It was used in the building of the offices of the Welfare Department, the Public Welfare Department that issued relief and—

Q Was this technique developed by the Communist Party?

A Yes.

Q Was it carried out under the direction of the Communist Party?

A Yes.

Q All right. Now tell us what this operation was.

A It was to mobilize and to get together a lot of people (tr. 923) on the streets through a street meeting and through having put out leaflets and then to direct the assembled persons in the name of getting more relief, to crowd the whole Welfare Office, jam full of people and to crowd all the corridors, including in front of the elevator so that no one could go in and out of the building without using some form of force to disperse them, and this technique was used in order to ostensibly, at least, in order to try to gain more relief.

Q Mrs. Hartle, you were asked—by the way, was it in the discussions relating to the use of this jamming technique, was there anything said about inciting the police to action to break up the jamming of the, of this public building?

MR. TAYLOR: Your Honor, can we have specifications set by whom and when, make the question wider?

MR. WOERHEIDE:

Q Was this discussion in the Spokane Section, Mrs. Hartle, in preparation for this jamming operation?

A Yes.

Q When did this discussion take place in relation to the time when the jamming operation was held?

A Before.

Q Very soon before.

A Yes, a few days before.

(tr. 924) Q Was there anything said at that time about using this technique for the purpose of inciting the police to take forcible action against the people who were besieging the Welfare office?

A Well, what was said was that if this jamming technique were successfully carried out and if could convince the people if they really jammed up the hall and in front of the elevator, that they could get more relief by doing this, if carried through successfully, and that the only way the police could break it up would be that they'd have to use force to do it.

* * *

TESTIMONY OF RALPH C. CLONTZ, JR.

(tr. 956) * * *

Q Your name is Ralph C. Clontz, Jr.?

A That is correct, sir.

Q Where are you from, Mr. Clontz?

A I am from Charlotte, North Carolina, sir.

* * *

(tr. 960) * * *

Q As a result of this agreement, Mr. Clontz, did you take any steps to get into the Communist Party.

(tr. 961) A Yes. In September, on September the 9th 1948, I wrote a postcard to the defendant, Junius Irving Scales, at his post office address in Chapel Hill, North Carolina. On the postcard I said that I was interested in communism and that I was a Duke Law School student. That was the substance of the postcard.

Q Now, after writing that postcard, did you hear from

the defendant, Junius Scales?

A Yes. Very few days after I sent the postcard, I received a large cardboard box filled with Communist literature, including the Daily Worker, Political Affairs, For a Lasting Peace, For a People's Democracy, and a large number of various other Communist articles.

Then several days later, around the 13th of September, I received a letter from the defendant, Junius I. Scales, referring to the literature.

* * *

(tr. 966) * * *

Q Were you subsequently invited back to his home, Mr. Clontz?

A Yes. I went back to see the defendant shortly before Christmas in 1948.

Q At that time was there any discussion between you and the defendant relative to Communist literature which he had furnished you?

A Yes. I told the defendant that I had read all of the Communist literature rather carefully. He told me that he was glad that I had, that he had sent me that huge box of (tr. 967) stuff on a hunch, that he had just received a big shipment of Communist literature in from New York from the Party Headquarters, and that he remarked in the conversation, that his hunch had proved very good. He was very delighted he had sent it to me.

Q Did he state to you any plans he had about literature or distribution of literature in this area?

A He did mention at that time that he was in the process of planning a book publishing house for use of the Party in North Carolina.

Q Now, Mr. Clontz, did you have a discussion with the

defendant during that time, during your visit before Christmas in 1948 relative to the means by which communism might be established in this country?

A Yes, sir; I did.

Q Give us that discussion, please. Tell us what the defendant said about it.

A After Scales and I had discussed my reading his literature, I told the defendant that it seemed to me that with as wonderful a system as communism offered, that if the Communist Party could educate the people, the people would vote in a Communist form of government, and that it seemed to me that it wouldn't be too difficult.

The defendant, Scales, answered that that was completely impossible, and I then was subjected to about a thirty-minute speech by Scales, pointing out how false, he said—

* * *

(tr. 968) * * *

The defendant said that the idea of bringing about communism by popular vote was first of all completely impossible, that the Government controlled all of the media of communication, the newspapers, the radio, and similar things, that, furthermore, the Government controlled the institutions of government, including the Army, the police powers, the educational system and similar things, and that that made it completely impossible because the Communists couldn't reach the masses to convert them to communism by an educational process.

He went on further and said that that concept was completely fallacious, that it was based on idealism. Idealism (tr. 969) he said, was a doctrine that Stalin and William Z. Foster had shown to be completely false, that as long as the institutions of government stood and were not overthrown, that ideas could absolutely do nothing.

He said that he and the other followers of Stalin believed that you could use the institutions of government, once you had taken them over, to get across the ideas to the people. But, the defendant said that a militant force would have to force a change in government and at that point he said that is where we come in.

Scales said that Engels, one of the philosophers, had believed and had expressed that once the revolution took place, the institutions of government would completely collapse, but he said that Stalin had not only thought it but, that he had proved that that idea was wrong.

Scales said that when the revolution took place in Russia that the Bolsheviks had seized the Army and the other institutions of government and had used those to protect their Communist Government from what he called the encroachments from the outside.

Scales in his last statement, said that force was the only answer.

(tr. 970) BY MR. GAVIN:

Q Did he say anything to you, Mr. Clontz, about the struggle between capitalism and the Proletariat?

A Yes. The defendant said that one thing that must be brought, borne in mind was there was always a struggle between the bloodsucking capitalist and the Proletariat of the working class.

Q Now, what, if anything, did he say to you at that time about certain security measures?

A The defendant told me that he and Communist members all over the United States were engaging in security measures, for example, he said that he and Vera, his then

wife, never made any phone calls from anything other than a public booth, that they regularly inspected their house in Carrboro looking, as he termed it, for dictaphones and other listening devices, and that they had to always be especially vigilant for people watching them.

Q Were you furnished with any Communist literature during that visit, Mr. Clontz?

A Yes. On that occasion I was furnished with a newspaper from the Soviet Union, titled The New Times, and two or three other pieces of Communist literature.

Q Do you know whether or not at that time you were furnished by the defendant a copy of State and Revolution?

A Yes, I was furnished a special edition of State and (tr. 971) Revolution at that time, and my recollection is also that he sold me a work titled Problems of Leninism, by Joseph Stalin.

* * *

(tr. 980) * * *

Q Mr. Clontz, I want to refer to your meeting with the defendant, Scales, during the latter part of September, 1948. At that time did you and the defendant discuss the strategy of the Communist Party in bringing about the revolution?

A Yes, we did.

Q Give us that strategy as revealed to you by the defendant.

MR. SMITH: Mr. Gavin, please, what is the date, September—

MR. GAVIN: September, 1948.

MR. SMITH: All right.

THE WITNESS: In the meeting around the end of September, 1948, and various other times, the defendant gave me the basic strategy of the Communist Party of the (tr. 981) United States. The defendant explained that basically their strategy was bottomed on a concept that there were two classes of people in this country, that could be used by the Communist Party to foment a revolution.

The first class he termed the working class or Proletariat, working class, he said, had as its natural born leaders or vanguard, the Communist Party.

The second class, he described, in this country was what he termed the Negro nation. The Negro nation he described as a separate nation in what he termed the Black Belt, including thirteen Southern States, and the strategy of the Communist Party was to bring the working class, led by the Communist Party, and what he termed the Negro nation, together, to bring about a forceful overthrow of the Government.

Now Scales and the Communist Party taught that the basic strategy of the Communist Party would never change, but that tactics might be altered as the situation changed.

BY MR. GAVIN:

Q You have used the word "Proletariat", Mr. Clontz. Did the defendant, Scales, define that word to you?

(tr. 982) A Proletariat was defined by the defendant as the working class. I later had it defined by others with the defendant in the Communist Party more restrictively, but at that particular, initial contact, he did not go into detail on just what the working class was.

Q Now you stated that the defendant talked of a Negro

nation, and the Black Belt. Did he explain to you, or elaborate to you that idea?

A Yes, during my contact with Scales—

* * *

(tr. 986) * * *

Q Go ahead, Mr. Clontz.

A It was explained to me by the defendant that there was a concept of the nation devised in what he called Marxist literature. He furnished me about a six or eight-point definition, and the position of the Communist Party as set out to me by the defendant was that these Negro people in the South, while they didn't know they were a nation, were in fact a separate nation, that they should be freed, that they should have the right to choose whether they wanted (tr. 987) to secede from the Union or stay in, that the basic strategy was to offer them their freedom and self-determination and invitation to join in the Communist government in the United States and that was one of the bulwarks of the Communist Party doctrine back during 1948 and '49, and, in fact, up until the time I lost contact with them.

* * *

(tr. 993) * * *

Q Now did you see the defendant on or about the 13th of July of 1949?

A Yes, sir; I did.

Q Where was that?

A That was in Carrboro, at his residence.

Q What did you discuss at that time?

A Well, at that time one thing I recall specifically was Scales' discussion of the coming of the revolution. He brought to my attention and quoted for me a dedication in

a book by William Z. Foster, the Chairman of the Communist Party U.S.A. The book was titled Twilight of Capitalism. He told me that Foster had dedicated that book to his great grandson, who would live in a Communist U.S.A.

Q Now was there any comment by the defendant as to when there would be a Communist U.S.A.?

A On that occasion Scales told me that there was a depression coming, and that the Communists viewed the depression with mixed feelings, that Communists would suffer probably more than anyone else in the revolution—correction—in the depression, but that they actually reveled in the depression because it gave them an opportunity to reach people that during prosperous times they couldn't even reach, and Scales remarked that if a depression came, William Z. Foster's grandson wouldn't have to wait so long.

(tr. 994) Q Wait so long for what?

A For the revolution.

Q Oh.

A Or for Communism in the United States, as had been put in the dedication in the book.

Q Now when did you see the defendant again, if you recall?

A My recollection was that it was in November of 1949.

Q Where was that, Mr. Clontz?

A That was in Carrboro, North Carolina.

Q What did you discuss with the defendant at that time?

A Well, in November of '49 the defendant stated to me that while he previously had thought that I should not join the Communist Party because of the risk of not being allowed to take the bar exam, that his feelings had changed, that he felt that by August of 1950 when the bar exams

came up, the hysteria that he said had been gripping the country would have popped.

He explained that he and the other Communists were very anxious that I not get detected as some of the Communists had been, so that they could get a lawyer here in North Carolina that was a Communist, that could serve the Communist Party and could defend Scales when he eventually came to trial.

He said that he was of the definite feeling that things (tr. 995) would pop, and he explained the basis for his feeling. He said that he just had been reading in some book which he didn't identify, the writings of Lenin back in 1917 and 1918; he said that the situation in Russia in that particular time and in the United States, in 1949, was a direct analogy. He said that Lenin had pointed out in his writings around the first part of the year that the Communists were a minority, that they were outnumbered, that they were weak, but that Lenin had still expressed hope.

He said that Lenin had pointed out in July of that same year the Communists were outlawed, the Bolshevik Party that is, were outlawed, and driven completely underground. Yet, he said, Lenin had pointed out that that very next October was the famous Russian October Revolution. Scales said that he saw exactly the same analogy here. Scales said that he did not foresee a bloody revolution soon, but that it would come inevitably exactly as it had in the Soviet Union.

Q Do you recall whether or not the defendant had undergone an operation about that time, Mr. Clontz?

A Yes, my recollection is that he had just had an appendectomy about that time, and I'd been out of touch with him for a few days because of that.

Q Did he comment to you on unemployment and economic unrest in the Country?

A Yes, on that occasion he said that he was very encouraged, that he was making progress in his work here as the Chairman of the Party in the two Carolinas, and that the unemployment and economic unrest had greatly assisted him.

(tr. 996)

Q What, if anything, did he say to you about a revolution?

A Well, as I have testified, he said that he did not expect a bloody revolution soon, but that certainly if depression came, that there would be a bloody revolution.

Q Now did you and the defendant—pardon me—did you finish?

A Yes.

Q Did you and the defendant discuss any further measures at that time that should be taken either by you or by him?

A Yes, my recollection is that it was in the November, '49, meeting, when the defendant, Scales, told me that I should stop parking near his house, but instead should park back on a back alley, or street in Carrboro that ran parallel, and that I should be particularly careful.

He explained to me that the reasons for this precaution is that someone had been taking down license numbers of people that came to see him. He also told me that some time before a truck had come and ridden around his residence there five or six times, that he first had come out on the porch and stared at them, and that didn't bother them, so that, as he put it, he had gone in and gotten his shotgun (tr. 997) and gone out there port arms and then they had taken off and hadn't come back.

He said also to discourage spying on him, he had purposefully gone down to the hardware store or some store of that sort in Carrboro and had purchased a brand new box of shotgun shells when the Carrboro police were around so they'd be sure to know about it. This, he said, should discourage spying on him.

Q Now on December the 11th, 1949, state whether or not you had a conversation with the defendant relative to your joining the Communist Party of the United States.
A Yes, sir; I did.

Q Where was that meeting, Mr. Clontz?
A December of '49 the meeting was in Scales' house in Carrboro.

Q What did he say to you about joining the Party?
A At that time he suddenly came out with the question. "Do you want to join the Communist Party now?" Having already cleared this matter with the Government, I answered him yes, that I wanted to join and that if he would give me the application blank, I'd fill it out.

He said that he would submit my application to the Party leaders, but, he explained to me that nothing was in writing, that everything was oral, that for security reasons they had done away with, completely, with any written applications or anything of that sort, that he would recommend (tr. 998) that I be allowed to join the Communist Party, but that it be effective in August of 1950, because quite a few, several, as he expressed it, of the Communists there had been prevented from taking the bar examination because of their Communist membership.

Q Did you get an application blank from the defendant?
A No, as I explained, he said there were no such things.

that they had been done away with completely.

Q What literature did you get from the defendant at that time?

A On that particular occasion I got three or four pieces of literature, as I recall. I was given a study outline titled Thirty Years of the Communist Party. I was given another study outline on the Communist Party and Industrial Concentration. I believe it was on this occasion that I was given an outline on the Foundations of Leninism that Scales had prepared himself, and there was another piece of literature at the time.

* * *

(tr. 1000) * * *

Q Now, Mr. Clontz, did you ever hear, or do you know of an organization that existed down at the University of North Carolina entitled The Karl Marx Study Club?

A Yes, sir; I do.

* * *

(tr. 1002) * * *

Q Now did you attend the Karl Marx Study Club when Aptheker spoke at Chapel Hill?

A I didn't attend the club. I attended the lecture that was sponsored by the Party and that club.

Q Was the defendant, Scales, present at that lecture?

A Yes, my recollection is that he was sitting directly across from me in Girard Hall, as I recall, in University campus there on that occasion.

* * *

(tr. 1003) * * *

Q Now, will you go ahead and tell us what Mr. Apthe-

ker spoke about on this date?

A Mr. Aptheker spoke about white chauvinism and racism. He, in his remarks, said that the Negroes in the South were then, in 1950, still in slavery the same as they had been in 1860, as I recall the date, that the white bosses would keep them in chains and in slavery until both the white and Negro workers that loved freedom forced their freedom.

I remember that he said that on that occasion that Marxists and Communists believed and knew that a revolution was both a certainty and a necessity. On questioning, he defined revolution as the kind of revolution that took place in the Soviet Union.

Q Did he say anything at this meeting about the Negro Nation in the South?

A Yes, he did. He explained that the Negro people, in what was termed the Black Belt, were a nation in themselves having various characteristics or common culture and various other things he named.

He said the Communists took the position that they were entitled to decide whether they wanted to be part of the United States or part of some other nation, and that this concept was what the Communists referred to as self-determination, that the Communist aim was to free them, at which time they would have the opportunity to exercise (tr. 1004) their choice of seceding or belonging to whatever government was formed.

Q Mr. Clontz, did Herbert Aptheker explain why the revolution occurred in the U.S.S.R., that is, Soviet Russia, before it occurred in the United States?

A. Yes, Apthek—

Q How did he explain that, sir?

A Aptheker explained that there were a number of reasons why the revolution came first to the Soviet Union. He said that the people there were more oppressed than they were in the other capitalist countries. He said also that capitalism was weakest in the Soviet Union, and he said finally that foreign capital had somehow been involved in bringing the revolution there quicker than it would come here.

Q State whether or not he made any prediction as to when the revolution would come in this Country.

A I recall that during the discussion period Aptheker was asked by some member of the audience whether the revolution would come in a matter of days, a hundred years, or a matter of months. His reply was that things were moving fast and people were getting more united, and that the Revolution certainly would come before too long.

* * *

(tr. 1007) * * *

Q Now, did you see the defendant, Scales, on or about January the 17th, 1950?

A Yes, I recall that date quite vividly because it was on that day that I finally, officially, became a member of the Communist Party.

Q Now, Mr. Clontz, did you become a member of the Communist Party with the knowledge of your government?

A Yes, sir; I did, and with their prior approval. In fact, I had never seen any Communist or the defendant until after I had been in touch with the Government had had my offer of services accepted.

Q All right. State your conversation with the defendant on this date, that is, January the 17th, 1950, relative to your joining the Party.

A The defendant explained to me that I was being very honored in coming into the Communist Party in that in his entire time in the Party in the Carolinas there had been only three other people allowed to come in the Party on a member-at-large basis. He explained that it had been decided that it would not be safe for me to join the local Dur-
(tr. 1008) ham Party club because they had to protect me from the F.B.I., and they had to allow me to get through the bar examination so that I would be available to defend Mr. Scales.

He said that he had taken it up with the Party Secretariat, a two- or three-man group, according to my recollection of what he said, and with the leaders of the Durham Club, and that they had voted on me without knowing who I was and allowing him only to protect my identity rather than have me go into the Communist Party Club.

At that time, or a few days later, he mentioned that they were practically certain that the F.B.I. had an informant in that area and they were wanting to protect me from him.

Q I didn't understand; were you issued a Party card, Mr. Clontz.

A No, I was not. I asked for a Party card and all I got was a receipt for my money. It was explained to me that, as he had previously explained, Party cards had been burned and membership credentials had been done away with, with, completely, because, as he explained, the Party members had lost them and thereby got compromised and exposed to the Government, and, accordingly, in this particular period there was no written records ever given other than the receipt for the money paid.

* * *

(tr. 1009) Q Now did the defendant say anything about tutoring you further?

A Yes, the defendant said that he was going to continue private tutoring for me as a member-at-large. He told me to continue studying the works of Marx and Lenin, and (tr. 1010) with particuular emphasis on another book I had purchased from him earlier, one titled Foundations of Leninism, by—I don't recall the title, I think it was by Stalin, but I am not sure.

* * *

Q Mr. Clontz, did you meet with the defendant, Scales, again on February the 8th, 1950?

A Yes, I did.

Q Do you recall your discussion with him at that time, sir?

A Yes. On that particular occasion Scales told me again of the steps he had had to go through in order to confer the honor on me of being a member-at-large. He told me that the club had voted the power to the club leaders in Durham, and they in turn had conferred power on him to make me a member-at-large in order that I might not be (tr. 1011) exposed and prevented from taking the bar examination.

Q Well, now state whether or not around that time you were undergoing a period of instruction by the defendant, Scales.

A Yes, during that period of time the defendant was giving me private instructions that he said would prepare me for my future work in the Communist Party and possibly for forming some sort of Underground cell or club in

Charlotte after I got through law school and moved down there.

Q Did you discuss the revolution when you were talking with him at this time?

A Yes.

Q Particularly, Mr. Clontz, I would like to ask if you discussed the matter of what time the revolution would come?

A Yes, I asked the defendant when the revolution would come, specifically. Scales told me that he had been giving that matter considerable thought, that he did not feel that we would have a revolution within a very short time, but that it would come in time, and when I pressed him as to some sort of timetable on the part of the Communist Party, he told me that he could say definitely that my daughter, who then was fourteen months old, would marry in a Socialist or Communist United States.

Q What did he say to you, Mr. Clontz, about a depression being imminent?

(tr. 1012) A He said, as he had expressed before, that he felt that a depression was imminent and that the depression would greatly accelerate the coming of the revolution.

Q Did he express his attitude or the attitude of the Party relative to a depression?

A Yes, he said that the Communist Party welcomed the depression, that they reveled in it because it would serve their purposes in revolution, reaching the masses of the people and making it easier.

* * *

Q Did someone else come while you were having this

discussion with him?

A Yes. After we had completed our discussion, as I recall, one Bernard Friedland, known and identified by the defendant as Bernie Friedland, the Communist Party Organizer for North and South Carolina, came in and joined us.

* * *

(tr. 1013) * * *

Q Did Mr. Friedland question you at the time he came to Clontz's home, I mean to Scales' home.

A Yes. He questioned at quite considerable length. We went into my—

Q What about, sir?

A We went into my background. He asked me what my parents did for a living. He asked me what class of people they were from. He questioned me as to my education, as to my Army experience, and when I told him that I had been a private in the Infantry and later had been a lieutenant, the defendant came to my rescue and said that I did not have the ideology of the officer class, that I wasn't in sympathy with them, and told Mr. Friedland that he didn't need to worry about my having been an officer.

He then started questioning me as to why I had joined the Communist Party. By "he" I mean Friedland. He said, "Aren't you scared to come into the Communist Party? We know the F.B.I. has an informant in this area," and, "Aren't you scared to come in because after all Laurent France, who worked over at Duke and various other Communists, have been discovered and prevented from taking the bar exam."

I told him that I was naturally concerned, but that Scales was going to take security measures to protect me.

He then asked me why as an attorney I had not sought out reform, to reform the system, if I felt that the system (tr. 1014) of government we had was wrong. I replied to Friedland that Scales had taught me that the entire court system, the entire system of justice in this country was so completely evil that only by overthrowing the whole government and doing away with it could we ever have justice; that apparently satisfied him, and the defendant.

I later got the defendant aside and told him from Friedland's questions I thought that he was an enemy or maybe a capitalist, and the defendant told me that he was a Party Organizer from up in New York and I didn't have to be concerned about his attitude, that he had just been testing me on my opinions.

Q Now did you meet with the defendant, Scales, on March the 7th, 1950, for study and discussion, Mr. Clontz?

A Yes. Prior to this time I had been issued an outline on the Foundations of Leninism, that the defendant, Scales, told me he personally prepared. During this period of time we were undergoing study. I would take his questions that he had given me and the book, Foundations of Leninism, and in between going to law school and selling insurance, I would study the material and then would meet to recite to the defendant, who in turn would give me the correct Party interpretation of those particular things.

* * *

(tr. 1015) * * *

Q Now, Mr. Clontz, to further clarify this, what is Government's Exhibit 6, Problems of Leninism, by Joseph Stalin, is also included in that book, is it not, sir?

(tr. 1016) A. I haven't examined that particular one. My understanding is that it is.

Q All right, sir.

A But this is a more complete volume that was sold to me by the defendant, Scales.

Q Well, if you will read the selection on page 131, please.

A The defendant, Scales, brought to my attention the marked portion here on page 131, the third pargraph from the bottom, as follows:

> "Can such a radical transformation of the old Bourgeois order be achieved without a violent revolution, without the dictatorship of the Proletariat? Obviously not. To think that such a revolution can be carried out peacefully within the framework of Bourgeois democracy, which is adapted to the rule of the Bourgeoisie, means that one has either gone out of one's mind and lost normal human understanding, or has grossly and openly repudiated the Proletarian revolution."

Scales pointed out this particular passage as simply proving to me, as he already had taught, that education and reform would accomplish absolutely nothing, but that revolution, a violent revolution was the only possible way to bring about a change in the form of government.

(tr. 1017) In that connection I recall a remark that the defendant, Scales, made when I asked him why education wouldn't work.

MR. SMITH: May I ask the date?

THE WITNESS: That was in, around the, December the 21st, as I recall, in 1948.

Scales then—I don't believe that I testified about this—made the remark to me that it would be nice if revolutionary

ideas would automatically produce a revolution. But it was on that occasion that he told me that it was impossible, that a militant force would have to bring about the revolution and that force was the only answer.

On this same occasion, that is, when we were discussing in March of 1950 that book, Problems of Leninism, in the outline, he brought to my attention the first quoted small print on page 133, starting, "However," on the last paragraph of page 132, as follows:

* * *

(tr. 1018) * * *

A No, on page 135, if I may read this—I can recognize—yes, that is correct. Someone has marked the book up since I saw it, and the part that he actually called to my attention begins fourteen lines from the bottom of the page, as follows:

> "Such are the characteristic features of the dictatorship of the Proletariat. Hence, the three main aspects of the dictatorship of the Proletariat; number one, the utilization of the power of the Proletariat for the suppression of the exploiters for the defense of the country, for the consolidation of the ties with the Proletarians of other lands, and for the development and victory of the revolution in all countries."

Q Now did he explain that portion to you?

A Yes, he said that this contained the explanation of why a revolution would be easier here, that while in the Soviet Union there had been no one to help the Soviet Party, that in this country when the revolution started, we (tr. 1019) would have the benefit of the help from the mother country, Russia, in bringing about our own revolu-

tion, because part of the purposes of the Communist Party in the Soviet Union was international in scope and that we naturally would continue to receive help in all circumstances from the Soviet Party when the revolution was started here in this country.

Q Well, now did he say anything to you about what form of help would come from the, from Soviet Russia?

A Yes, I asked him whether, I asked him what kind of help we would expect. I asked him whether troops were going to be landed or just exactly how we would get help. Scales said that we could not expect the Soviet Union to land troops to start our revolution and finish it.

Scales further said that experience had taught the Communists that that sort of approach was disastrous, that we Communists in this country would have to start the revolution, and we would have to continue fighting it, tha' they in China, the Communists, had sent in Russian generals and the only result had been that the Chinese Communists had been licked completely, that the new approach, of the Soviet Union, was shown in the example of Mao, who was then Mao-Tse-Tung, who was then the leader in the Communist Chinese Government.

He pointed out that Mao had never even been to Russia, but instead the Soviet Union and the Soviet Communist Party had sent over military leaders to instruct Mao, and (tr. 1020) his leaders, and had sent over professional revolutionaries that could aid them in bringing about their revolution.

He said that we could count on drawing on the experience of the Soviet Union, and that they also would furnish us when the revolution came with experienced revolutionaries from Russia.

He said that one thing certain was that if the United States declared war on the Communists in their revolution, then the Soviet Union would land troops, and he said that would be a bloody time for all.

Q Now did you have a further discussion with him at that time relative to the Communist Party and labor unions?

A Yes. Scales said that there was a basic difference in the Communist Party and organizations, such as, labor unions. He said labor unions didn't have the advantage the Party had, of being able to see beyond the next hill. That a labor union could only see to the next hill, whereas the Communist Party could see all the way over and could see the ultimate goal, the Communist Party United States. This he termed one of the advantages the Communist Party had over the short-sighted organizations like a labor union.

Q Did he ever explain to you, Mr. Clontz, what he meant by socialism in this country and when I say "he" I mean the defendant, Scales?

A The defendant in his conversation used interchangeably (tr. 1021) socialism and communism. I later was taught that there is a technical difference, but when the defendant, Scales, and other Communists speak about the violent revolution, they refer to bringing socialism to this country.

Q Now on March the 24th of 1950 did you again meet with the defendant, Scales?

A Yes, I did.

Q Was that at his home in Carrboro?

A Yes, that was in Carrboro.

Q State whether or not you discussed your membership in the Party at that time.

A Yes. There was a brief discussion of my Communist

Party membership, it being explained to me, still by the defendant, that I was to remain a member-at-large and was to be protected by security measures he devised to keep the F.B.I. from finding out about me.

Q Now at that time, I want to ask you if you had a discussion with the defendant, Scales, relative to his concept of a materialist, a discussion of the term "absolute good;" did you have such discussion?

A Yes, I did have.

Q What did the defendant, Scales, say to you about that Mr. Clontz?

A The defendant, Scales, said that the Communist who was a materialist did not believe in the thought that there (tr. 1022) was an absolute good. He said the Communist position was that everything was entirely relative, relative, that is, to whether it helped or hurt the Communist Party. He said that materialist is new; that there are no such thing as a sin, that, for example, it was not always wrong to lie and steal and cheat and those various things. He gave his reason that, for example, in the revolution if the Communists or if the Bolsheviks had not stolen arms, they couldn't have brought about their revolution, so that certainly it wasn't a sin for them to steal on that occasion.

And he said that if a Communist was asked a question or was ordered to fill out a questionnaire as to whether or not he was or ever had been a member of the Communist Party, that it was certainly entirely proper for him to lie and say that he was not or never had been, because that was basic protection for Communists, that otherwise he might be fired, so that everything was viewed by the materialists and by the Communists as a relative matter, depending on how it particularrly affected the Communist

Party and the Communists in question.

This, he said, was a materialist concept.

* * *

(tr. 1025) * * *

Q Mr. Clontz, before the noon recess you were testifying relative to a meeting with the defendant, Scales, on March the 7th, of 1950. At that time you stated that Scales explained to you or advised you about the help that the Communist Party in this country might obtain (tr. 1026) from Soviet Russia during the revolution. I want to ask you if you have referred to your notes since the, or during the noon recess and refreshed your recollection, and if it was not in the meeting on March the 24th that he advised you as to the help that might be expected from Communist Russia?

A Well, actually, during both meetings the subject was dealt with. In the meeting, the first meeting there, the 7th of March, the defendant said and pointed out that the revolution would be easier here because the Soviet Union had had no outside countries to assist it when their revolution came about, and it was on that meeting then that he said we could expect all possible help from the Soviet Party when the revolution came about.

His reference to the landing of the Russian troops was in the next meeting which was on March the 24th, 1950, during which he told me about the experience the Soviet Union had had in China, and it was during that time that he told me specifically that the Soviet Union was not landing troops until they start the revolution, and the other testimony that I gave with the reference to his Soviet Union landing troops in the event that the United States Government attacked the revolutionists, and it was on that occasion, March the

24th. 1950, when he said that it would be a bloody time for all when the Soviet Union did land those troops.

Q Now you have identified Foundations of Leninism, (tr. 1027) which has previously been offered as Government's Exhibit No. 5. I wish you would take that exhibit, that is what you identified, I believe, as the copy of Foundations of Leninism. Are they the same, Mr. Clontz?

A I would have to compare them. The covers are different.

Q Will you turn to page 90 in Government's Exhibit No. 5.

A Yes. They are identical on page 90.

Q Will you read from Government's Exhibit No. 5, or the copy, if it is the identical copy, read the article entitled Stages of the Revolution and Strategy.

A In Government's Exhibit 5, on page 90, there is the heading number two, Stages of the Revolution and Strategy.

> "Strategy is the determination of the direction of the main blow of the Proletariat at a given stage of the revolution. The elaboration of a corresponding plan for the disposition of the revolutionary forces, parentheses, the main and secondary reserves, close parentheses, the fight to carry out this plan throughout the given stage of the revolution. Our revolution already passed through two stages and after the October Revolution it has entered a third stage. Our strategy changed accordingly."

(tr. 1028) Q Now will you go ahead to page 91?

A 91, the third line from the top:

> "The Proletariat must accomplish the Socialist rev-

olution by allying to itself the mass of the semi-Proletarian element of the population in order to crush by force the resistance of the Bourgeoisie, and to paralyze the instability of the peasantry and the petty Bourgeoisie."

You want me to continue?

Q Did you read all the page 91?
A No, the rest of page 91:

"Third stage, commenced after the October Revolution. Objective, to consolidate the dictatorship of the Proletariat in one country, using it as a base for the overthrow of imperialism in all countries, the revolution is spreading beyond the confines of one country. The period of world revolution has commenced. The main forces of the revolution, the dictatorship of the Proletariat in one country, the revolutionary movement of the Proletariat in all countries, the main reserves, the semi-Proletarian and small peasant masses in the developed countries, the liberation movement in the colonies, and dependent countries, direction of the (tr. 1029) main blow, isolation of the petty Bourgeois Democrats, isolation of the parties of the Second International, which constitute the main support of the policy of compromise with imperialism, plan for the disposition of forces, alliance of the Proletarian Revolution with the liberation movement in the colonies, and the dependent countries. Strategy deals with the main forces of the revolution and their reserves. It changes with the passing of the revolution from one stage to another, but remains essentially unchanged throughout a given stage."

* * *

(tr. 1031) * * *

Q Now, Mr. Clontz, do you know Henry Farash?

A Yes, I do.

Q Did you meet him on or about June 15th of 1950?

A Yes, I did. I met him with the defendant, Scales, in Durham, North Carolina.

Q Now where was—where?

A It was in Durham, North Carolina, as I recall, at a Dairiette in Durham.

Q Now did you have a discussion with the defendant, Scales, about that time relative to the Jefferson School?

A No. It was not at that particular occasion. I had discussed it with the defendant shortly before that, as I recall; I had seen on various occasions advertisements in the Communist paper, the Daily Worker, about a school in New York City, entitled Jefferson School of Social Science. I called that advertisement to the defendant, Scales', attention, and asked him what it was. He told me that the Jefferson School was a school operated by the Communist Party, (tr. 1032) that he had not personally been to the school, but that it was patterned after a National Party School he had attended, that it was operated by the Party, but with the pretense that it was just an ordinary school that anyone could attend, and he said that the instructors; my recollection is that he said all of the officers and most of the instructors were members of the Communist Party and prominent Communist theoreticians and teachers.

Q Did you express a desire to the defendant to attend that school?

A Initially I expressed an interest, and asked him to make inquiries and, after having obtained Government approval,

I then told him that I would like to attend the school, the problem being that I had to take the bar examination the first three days of August of 1950, and I asked him to contact the Party or the School to find out if there would be any classes available during the period I would be free.

I also asked him what possible help I could get, because at the time, in August, of 1950, I would be just through the bar examination and for all intents and purposes unemployed.

Q What did he say relative to getting a scholarship for you, Mr. Clontz?

A Well, the defendant said that he thought that he could get a scholarship for me, that he knew one Doxey, D-o-x-e-y, A. Wilkerson, who was in charge of scholar-
(tr. 1033) ships, that he knew him personally and felt certain that the Communist Party would allow me a scholarship.

He said that he wasn't sure that they would be able to help me find a place to stay because security regulations were very strong in New York at that time. But he promised to write and get a catalog and assist me in making my plans.

Q Did you hear from Doxey Wilkerson shortly after that, sir?

A Yes, some time after that I received a letter from Doxey A. Wilkerson.
(tr. 1034) * * *

The letter is addressed Mr. Ralph C. Clontz, Jr., P. O. Box 785, Durham, North Carolina.

"Dear Mr. Clontz, Jr.:

"The scholarship application form you requested is

enclosed. Please return to me promptly. Also enclosed is a copy of our summer catalog with details as to program. We shall inquire about inexpensive living accommodations and let you know if we learn of something. Presumably you want only a room for yourself. We are glad to know that you plan to be with us this summer. Sincerely yours, Doxey A. Wilkerson."

* * *

(tr. 1037) * * *

Q Mr. Clontz, you have what has been marked for identification as Government's Exhibit 51. Will you state whether or not that is the application for a scholarship which you submitted to the Jefferson School of Social Science?

A This is a photograph made, as I recall, in my presence, of the application form after the defendant had helped me fill it out. The original, of course, was mailed to the school to Doxey A. Wilkerson, but this is an accurate copy.

Q Now, Mr. Clontz, I will ask you if where it says "Name," you have not filled in that line with the name Ralph Clayton?

A Yes, that is correct.

Q Why did you do that?

A When I got the application for scholarship, I took it to the defendant, Scales, and asked him to help me fill it out. I started filling in my correct name, where the top line calls for name, at which time I was told to erase it, that no Communist—

Q Just a minute. Who told you to erase that?

A The defendant, Scales.

Q All right, sir.

A That no communist going up to New York to this

(tr. 1038) school from out of the state registered under their right names, but instead, that it would require an alias, so the defendant and I selected as an alias my first and middle name which is Ralph Clayton, and it was under that name that the scholarship application was filled out.

(tr. 1039) * * *

Q Mr. Clontz, what did Scales say to you about his having to certify you as a good Communist before you could be enrolled in the Jefferson School?

A The defendant told me that even though the catalog made it appear that just anyone could go to this school, that unless he certified me officially as the Communist leader in the Carolinas to be a good Communist, that my application would not even be given any consideration at all.

(tr. 1040) Q Do you know whether or not Mr. Scales did certify you?

A Yes, he did. The defendant wrote me a letter, that I was to attach to either the scholarship or the application for the school, as I recall it, was sent to Doxey A. Wilkerson.

* * *

(tr. 1045) * * *

Q Now, Mr. Clontz, on or about August 5th of 1950 did you go to New York to attend the Jefferson School of Social Science?

A Yes, sir; I did.

(tr. 1046) * * *

Q All right. After you got to the school, will you tell whether or not there were any security measures in effect there?

(tr. 1047) A Yes, there were very strict regulations in effect. For example, as you—the building is about a six-or seven-story brick structure. As you enter the front door, there is to the left of the entrance foyer the Registrar's

Office. Immediately to the right there are a set of stairs, and an elevator. The stairs were strictly off limits to students.

Many of the floors had the doors locked, leading from the stairs off into the particular floor, and the orders were that only with special permission could any student go above the ground floor other than by the elevator. You could not enter the elevator and leave the first floor unless you had a pass.

Now when we registered each of us was given a coded class card which did not contain anywhere thereon our name or the name of the school, in many instances, but which identified the title of the class by catalog number, the hour of the day, or night, because the school operated day and night there. In order to get them above the first floor, the elevator operator, who served as a guard, would examine your card before allowing you to come on the elevator, and if you didn't have a class card showing that you had business on above the first floor at any time during the day, you were told to get off.

In leaving the elevator, your card was checked by the guard to make certain that you got off on the particular floor.

(tr. 1048) Furthermore, there were regulations that no one could go above the first floor until the instructor had already gotten to the classroom.

They also had a double check on this regulation in that after you got into the class, the individual instructor went around and made certain that every member in the class had the proper class card.

I remember on one occasion a student was found without

a card, and the student was required immediately to leave and go get a card before being allowed to even sit in and hear anything.

This was described to me by Doxey Wilkerson during August of 1950 as security measures designed to keep the F.B.I. from getting anyone in the school and spying on them.

Q Mr. Clontz, did you take some special instruction under Doxey Wilkerson at the school?

A Yes, I did.

* * *

(tr. 1059) Q Now, Mr. Clontz, before the recess you were testifying about your attendance at the Jefferson (tr. 1606) School. I want to ask you what security regulations were in effect at the school, and particularly I want you to describe to the Court and to the jury what security measures were taken to protect Doxey Wilkerson.

A In addition to the other normal security regulations to get above the first floor of the Jefferson School, I found that without a special pass good for one trip only, you could not even get the elevator man to stop at the floor on which Doxey Wilkerson and the other staff and faculty had their offices located.

On that particular floor a large Yale lock secured and prevented entrance from the stairway, and I was told that in order to see Wilkerson, I was told by Doxey Wilkerson, it would be necessary for me to secure the pass from the switchboard operator in the Registrar's office.

The procedure setup was that I would go to the switch-

board and ask the switchboard operator there to tell Doxey Wilkerson that sometimes Clayton in North Carolina, and sometimes Ralph from North Carolina was there and wanted to see him. At that Doxey Wilkerson would O.K. my passage and I would be given, given a handwritten slip of paper on which was written "Admit the bearer to the fifth floor," as I recall, to see Doxey Wilkerson.

When I first went up there this slip was handed to the guard, who kept the slip. Later th eslip had to be turned (tr. 1061) in to Doxey Wilkerson, who would burn the slip or otherwise dispose of it, and you could not use the slip more than one time.

Q Did you on or about August the 17th of 1950 have some private instruction from Doxey Wilkerson relative to capitalism and Fascism?

A Yes, I did. I had intially scheduled myself for two weeks at the Jefferson School, as I testified before the recess. Doxey Wilkerson was to give me private instructions, which he explained would be the same that I would have gotten if I had taken regular courses at the school, the subject matter being designed to prepare me better to be a Communist here in the Carolinas.

My two weeks, later at the request and suggestion of the Government, turned into three weeks up at the school, and, accordingly, Doxey Wilkerson gave me the private instruction in his office for a two-week preiod.

The last two weeks I was in New York this particular occasion was one of the first of those private sessions in question.

Q Well, at that time did he describe to you the differ-

ence between capitalism and Fascism?

A Yes. Doxey Wilkerson said that there actually was not too much difference in capitalism and Fascism. He said the basic difference was that under Fascism there was no (tr. 1062) pretense at giving workers any freedom or any voice in the running of things, that they were slaves, that basically the capitalists were a smaller group under Fascism than under capitalism.

He said that under capitalism there was a larger group of oppressors, the ruling class, capitalists, as he called them, and that they did allow the workers some token freedoms, and pretended to allow the workers a voice in the running of things, but that actually it was not basically different, other than in degree.

Q What did he tell you, Mr. Clontz, relative to the position of the United States and Fascism?

A He said that the United States then in August, 1950, was right on the verge of Fascism and that its approach was imminent.

Q Did he explain why?

A Well, he explained to me that the United States leaders were scared. He said that they were afraid of the forces the Soviet Union had martialed. He commented on the fact that the Soviet Union and China and the people's republic were a stronger force.

I recall he said that India was veering toward the left, and that France and Italy would fall to the Communists, unless the United States acted immediately. He said that one reason why the revolution would come was that the (tr. 1063) capitalists were hastening their own death by their actions and that Fascism would bring about a change completely in all of our thinking and mode of action.

Q Now, Mr. Clontz, did Wilkerson tell you what position the Communists in the United States would take in the event of war with Russia?

A Yes. He said that one of the things that frightened the United States leaders was they knew that not only did they have to contend with China and the other Communist-dominated countries, but that also in every capitalist country the working class party, the Communists, would be working from within.

He said, for example, that it was a known fact that the Communists in Italy, rather, in France, England and the United States would never take any part in waging war or fighting the Soviet Union, and said that that was one of the things that frightened the United States leaders.

Q Did he tell you whether or not the Communists had ever believed that communism could be voted into the United States?

A Doxey said that prior to this time in August of 1950, there had been some members of the Party who had expressed hope that possibly a change in government could come about without a violent revolution.

Now he brought to my attention the fact that in that book, Twilight of Capitalism, put out by William Z. Foster, (tr. 1064) the National Chairman of the Party, Foster had said in there that the Communist position was that a revolution would not be necessary, that is, that force and violence wouldn't be necessary, but instead that they believed that a people's government could be voted in, but he called to my attention that Foster had been, as he put it, smart enough to qualify that statement and he pointed out that Foster had said that it could be voted in under present conditions.

Now he said that comments by Foster had caused considerable stir and agitation among the Party leaders. He pointed out that it was written during the Communist trial, or concerning the Communist trial of the original eleven leaders, and he pointed out to me that in the May, 1950, issue of Political Affairs it had been commented on by one of the National leaders as being something that no longer was possible.

He said that since Fascism was approaching, that that was a sort of change in conditions, Comrade Foster had had in mind, and that now that we were on the verge of Fascism in the United States, you could forget all this drivel about peaceful means and that the Communist Party recognized and expressed to themselves that the only kind of means would be proper means, which would be forceful means, that no longer was there any even pretense among intelligent Communists that any voting system or any peo-
(tr. 1065) ple's election could bring this government.

Q Did he tell you how that revolution would be started, Mr. Clontz?

A Well, he told me that the revolution basically would come about by combining the forces of what had been already identified as the Negro nation and the working class, with the Communist Party leading the working class as the vanguard, and that a violent revolution would be necessary to overthrow the Government.

Q Mr. Clontz, the Korean War was on at that time, was it not, sir?

A Yes, it was.

Q What did Wilkerson say to you would happen if the Korean War should turn into World War III?

A Wilkerson said that if the Korean War should turn

into World War III, the Communist forces in Korea and throughout the world would whip the United States forces without any trouble at all, and he again pointed out that the Communist Party would be helping out from within in this country and the other countries.

Q Did he make any statement to you about how long it would be before there would be a Communist government in the United States?

A On that particular occasion he said that, as I recall, it wouldn't be as long as it had been, and that the Fascism (tr. 1066) had speeded up the timetable.

He commented, I believe it was on this occasion, that the capitalists seemed determined to bring their immediate death rather than letting it take a long time as it otherwise would happen.

Q What, if anything, did he say to you about a comparison between the Communist form of government that would exist in the United States and the Communist form of government as it exists in Soviet Russia?

A Well, he said that the ultimate goal and the final result would be the same kind of Communist U.S.A. as the Communist Soviet Union.

Q Now, Mr. Clontz, I direct your attention to the date of August the 19th, 1950, and I want to ask you if you had a discussion with Doxey Wilkerson on that date relative to the Communist Party and how it should work after it was outlawed?

A Yes, I did.

Q Will you tell us what he said about that?

A Doxey had a session with me in his office at the Jefferson School, and I recall his instruction invariably in-

volved the use of little pieces of paper. He drew a line on a piece of paper and drew a line down the middle. On one side he said "legal", and on the other side he said, "illegal", and he explained, pointing to that, that the Com-
(tr. 1067) munist Party was now going into that phase, pointing to the part he had labeled "illegal." And he said that from now on our activities, meaning the activities of the Communist Party U.S.A., would be illegal, that in all likelihood the Communist Party would be outlawed.

He said that for this reason plans were then being studied in Party Headquarters and that he was participating in those plans to put the action of the Communist Party on a more individualistic basis. The idea being that cutting down your Party groups to smaller units would make them harder to detect, and that, of course, if the Party was outlawed, the Communists would have to learn to operate on an individual basis.

Q Did he say anything about the Communist Party in the South being experienced in its Underground operation?

A Yes. Said that that shouldn't be too new to us down South, because the Communist Party in the South had been partly underground for a long period of time. He also commented that I shouldn't be dismayed, that one thing was for sure, and that was there would always be a Communist Party even though the Party pretended on the surface to disband, and at that time he said the Party leaders and he working with them were making plans for secret communications to keep the flow of what he called life blood from New York down to the Communists in the field in the Carolinas and all over the country.

(tr. 1068) He said we could count on their leadership

and guidance whether officially the Party was disbanded or not.

Q Now, Mr. Clontz, you had with Doxey Wilkerson at that time some discussion about the Appellate Courts in the United States, did you not?
A Yes, I did.

Q I want to ask you if he gave you a formula which had been established by the Appellate Courts relative to communism, and if he wrote that formula down for you?
A Yes, he did.

Q Will you take this chalk and write that formula on the blackboard here, please, sir?
A Pull the blackboard out here.

MR. SMITH: What is the date?

MR. GAVIN: What is that?

MR. SMITH: What is the date of this?

MR. GAVIN: This is on August the 19th, 1950; is that correct?

THE WITNESS: Yes, that is correct.

BY MR. GAVIN:

Q What formula did he—
A He wrote on a piece of paper what he said was the formula that had been compounded by the Appellate Courts in the land.

The formula was "M-L=F & V", abbreviation force (tr. 1069) and violence.

Q Well, now did he explain that formula to you?

A Yes, he did in detail. That formula, he said, stood for the proposition that Marxism-Leninism equals force and violence, and he amplified it by saying Marxist-Leninist teachings equal force and violence.

Q Now in view of the court decisions, as he explained them to you, how did he tell you that the doctrines of Communism could and would be taught in the United States?

A Doxey Wilkerson explained to me that since that formula had been established, action had had to be taken by the National Party to conceal the fact that their principles and their goal and their aims and their doctrines included forceful and violent revolution. He pointed out, for example, that an official statement had been issued by the Education Commission of the Communist Party U.S.A. disowning or disclaiming certain study outlines, certain texts, certain publications put out by the Communist Party.

In fact, the order had ordered all Communist Party members to turn those in, and the statement, he said, after that particular date—I don't recall the exact date—had said henceforth, we will not recognize these as official Party publications.

He said by doing that they accomplished two things. They, first of all, established a technicality for Com- (tr. 1070) munists on trial and their attorneys, that the Party no longer accepted Marxism-Leninism, because, he said, all Marxism-Leninism included in its teachings and in its concept the basis of a violent revolution.

He said, secondly, that it did not unduly hamper the Communist Party, that in the future many things would be left unsaid that previously had been said, many things

would be left unwritten that previously had been written, that, for example, in teaching a mere bare outline, would be given, and the instructor would fill in the revolutionary part, or the students would be sent into the Marxist-Leninist works as references to find the revolution, without having it spelled out in the outline.

He said, that, naturally, would not change the basic Party goal or the basic aims of the Communist Party, but that it would make it more difficult for Communists to be convicted.

Q Now, Mr. Clontz, did you discuss with him—

Your Honor, let me move this out of the way.

A One thing I recall during our discussion, he had given me a pamphlet, a study outline entitled White Chauvinism, and he pointed out to me, he said, "Now I have been instructing you from that outline, but technically it is illegal because we Communists have disclaimed it, so that you are holding an illegal document there, actually."

Q Did you discuss with him what you should do when (tr. 1071) you returned to North Carolina, Mr. Clontz?

A Yes, I did. The defendant had suggested that I get Doxey Wilkerson's guidance in matters of that sort, and I asked his opinion as to how I could best serve the Communist Party, taking into account the fact that I was an attorney, and so on.

Q What did he say to you?

A Doxey advised me that I would be foolish to come out openly and let my Communist Party membership be known, that instead, I should remain under cover and that I would be much more helpful to the Party when the revolution came, while, at the present time I wouldn't be

as important by coming out in the open and getting exposed.

He also advised me on a series of personal tactics. He advised me to join civic organizations, political organizations, the Rotary Club, and things of that sort, try to get in a position of leadership, try to establish what he called roots in the community. He explained that way, if you could get a background of respectability, that it would make it more difficult for people to attack you, if you were accused of being a Communist, and he also pointed out that I could use my influence in these organizations I would join, to lead them in the right direction as far as they would go.

He also—I don't recall whether it was at that meeting or a couple of days later—he advised me that I, never-
(tr. 1072) theless, should maintain contact with an undercover Communist club because if I got isolated without Party direction, my efforts would be pretty largely wasted.

Q You said that he told you that after infiltrating clubs and organizations you should use your influence to lead them in the right direction. Did he tell you what the right direction was, Mr. Clontz?

A Well, towards our, the goal of the Communist Party, which he had already expressed to me, being the undermining of the Government and overthrowing the Government, bringing communism in the United States.

Q The overthrow of the Government in what way, Mr. Clontz?

A By a revolution.

Q I see.

Now you stated that he illustrated his lectures to you by drawing diagrams. Did he preserve those diagrams?

A No, I copied those diagrams into my class notes, or my notes I took, and later showed them to the defendant, Scales, when I came back. But Doxey, on that particular occasion, as he finished his lecture, the small scraps of paper he picked up and burned individually in a large ash tray he had on the desk, and he told me that he had burned, as I recall, three baskets full of incriminating documents that very day.

Q Mr. Clontz, on August the 25th, 1950, you met with (tr. 1073) Doxey Wilkerson again, did you not?

A Yes, sir.

Q I ask you if you discussed with him at that time your conversation with another member of the Communist Party as to when the revolution would come?

A Yes, I did. After Doxey Wilkerson and I had briefly discussed a rally which had been held for Communist Party members in New York the week end before, I told him that another Communist and I had been debating between each other as to just when the Communist revolution was going to come, that we couldn't decide whether it was a matter of months or years or just when. And I asked Doxey for his opinion on that question.

Doxey's answer to me was that first of all conditions were rapidly changing, that as he had pointed out to me in our prior meetings, we were on the verge of Fascism, that as an example of how rapidly the change was coming, he pointed out that when Comrade Foster, the Chairman of the United States Communist Party, division of the Communist Party, had written his book, Twilight of Capitalism, when he sent it initially to the publishers, he had had the dedication to, "My grandson, who will live

in a Socialist United States," to "My great grandson," rather.

He said that just a very short time before the book went to press, Foster had called up and insisted that they (tr. 1074) change it from the word "Socialist" to "Communist" and he said that that certainly showed the attitude of the Communist Party leaders as to when the revolution would come.

Another thing that he called to my attention was the Communist Party rally that I had attended. Now that rally was one that I had attended through the assistance of Doxey Wilkerson. He explained to me that the rally which was one or two days before this particular session, was closed to Party members and security was so tight that Doxey had had to go down personally to pick up my ticket, and the one for him and Mrs. Wilkerson.

He called to my attention a rather humorous joke that had been told by, as I recall, Irving Potash, one of the National Communist Party leaders. Potash, during that rally, had said that Comrade Stalin had been in jail for a certain number of years. I think it was twenty years, and had he, had he emerged as head of the Communist Government, said that he'd settle for a little shorter time in jail and a lesser position. He commented on that, which was intended as a joke, he said, but that actually behind that you could tell from what he called the climate of their speeches that those Communists and the other Communist Party leaders were not in a mood to wait and that it would not be too long before the revolution would come.

Q Mr. Clontz, you stated that Wilkerson advised you (tr. 1075) that William Foster changed the dedication in

his book to read to his great grandson, or—strike that, please.

You stated that Wilkerson told you that the dedication in Foster's book was first in this form, "To my great grandson, who will live in a Socialist United States." Then you said that just prior to the publication of the book the word "Socialist" was changed to "Communist." Did he explain the significance of the change from Socialist to Communist?

A Yes, he did. Doxey explained that while Communists in their general conversations and in their publications speak of bringing socialism to the country, that by so doing, they use interchangeably socialism and communism, but that technically from the standpoint of a Communist theoretician, that socialism was the stage prior to communism; that, for example, the Soviet Union had not gone after the revolution immediately into pure communism, but that instead the Soviet Union was even then still in what was technically called socialism, in that there still were immediately after the revolution certain classes, whereas communism was completely a classless society.

Q Now did he explain to you how the capitalists in the United States were helping to bring about the revolution quicker?

A Well, he said that it was on this occasion, that he (tr. 1076) said, the capitalists were speeding their death. He said that if they started a world war, if the Korean War was converted into World War III, that the revolution would come much quicker than otherwise would be expected.

Q What, if anything, did he say to you about starting the revolution too soon, Mr. Clontz?

A He said that we Communists did not want any martyrs, that the revolution should be started when the time was ripe, and not prematurely.

Q Now you stayed at the Jefferson School in New York about three weeks, didn't you?

A Yes, I did. I stayed a total of approximately three weeks.

Q Did you return to Charlotte then?

A Yes, I returned then to Charlotte and started in practicing law in Charlotte, North Carolina.

* * *

(tr. 1077) * * *

Q All right, sir. Now I want to ask you about your next meeting with Junius Scales and Henry Farash on Septem-
(tr. 1078) ber the 26th, 1950, or thereabouts. Do you recall that meeting, Mr. Clontz?

A Yes. That was a meeting with the defendant and Henry Farash, F-a-r-a-s-h, around the end of September of 1950, in Durham, sir.

Q Where?

A In Durham, as a I recall.

Q Do you recall whereabouts in Durham?

A I think that, or my recollection, rather, is that I met them at Coles Dairiette, and that after that we went up to my hotel room at the Washington Duke Hotel in Durham.

Q Now what, if anything, did Farash say to you about the clubs breaking up into smaller units?

A Farash told me in the presence of the defendant that they had just received orders from the National Headquarters that the Communist Party was to be put on a

more individualistic basis, that this meant breaking down the Party cells or clubs into smaller units, and that that was one of the things that he and the defendant were concerned with at that time.

Q Did he tell you how he and the defendant, Scales, had been engaged in raising money?

A Yes, he said that they had been engaged in a fund-raising campaign for the legal defense of the Communist Party members under indictment.

As I recall, they demanded a rather sizable contribution from me on that occasion.

(tr. 1079) Q Do you know about what that was, or what they were requesting of each member, Mr. Clontz?

A It was either a week's pay or a month's pay. I don't recall the exact amount.

Q Now did Junius Scales at that time outline to you an, additional security measures to be taken?

A Yes, he said that he and Farash had talked things over and that immediately additional security was being put into effect with respect to me, that in the future, whereas in the past, we had used postcards, no postcards would be used whatever, that no longer would the defendant write me in his own handwriting, nor was I to write him, or Farash, or any other Communist in my own handwriting, but instead, we were to use the typewriter exclusively, that I was to address him only with the initial J, and sign it with the typed initial R, and he, in turn, would use the same system of signing SJ and addressing me as Dear R; that I was to be particularly careful not to put any return address on the outside of the envelope whatever.

Q What did he say to you, if anything, about remain-

ing an Underground member?

A He told me that I definitely would remain an undercover or an Underground Communist Party member, remaining a member-at-large, and at that time I discussed with him Doxey Wilkerson's proposal that an Underground Club be set up, or that I be allowed to (tr. 1080) attend such a club up in Durham.

He said that either he or Farash would come down to Charlotte and discuss that with me.

Q Did he tell you what preparations, if any, you should make, or what duties you should undertake as an Underground member of the Party, Mr. Clontz?

A Well, at that time, he told me that there were certain specific projects he wanted me to undertake while he was getting around to organizing the Underground Club.

For example, Farash was at that time preparing an article on the Ku Klux Klan. And they asked me to dig up any information I could. Later they actually had me go down to South Carolina and cover a Ku Klux Klan Rally for the Communist Party. He asked me, he or Farash, one, asked me to undertake writing an article on Jim Crow Justice in the South, an article that would be used to spread around that justice was impossible in the South, and also he suggested that I act as a local reporter, looking for anything that might be of interest in the Daily Worker.

At that time I was to send the articles to him. He later was to send them to the Daily Worker. This later was changed when I was told to send them direct to a John Pittman, who was a Communist columnist at the Daily Worker known by the defendant.

Q Now, Mr. Clontz, you have testified about the courses (tr. 1081) that you took at the Jefferson School. Did you report on those courses and exhibit or show the notes that you took on those courses to Junius Scales?

A Yes, I showed them on that occasion to both the defendant and to Farash. I had my actual class notes there. I read over the subject matter with them and showed them the various diagrams, such as the formula for force and violence, and commented to them how much more effective the presentation was with the various charts that Doxey Wilkerson had used.

I also agreed with them that it was the same thing they'd been teaching me, but that I felt it was a little better taught at the Jefferson School because of the better teaching aids that they had there.

Q Did you discuss with them all of the instructions that you had received at the Jefferson School, Mr. Clontz?

A Yes, I went over all of it with them.

Q Do you recall whether or not the defendant, Scales, made any comment about your report?

A About my—what do you—my report?

Q What you reported to him at that time.

A Oh, he did tell me that he was very pleased with that I had taken advantage of the writings up there, and either at that time or a short time after that he said that he would in turn receive a report from the school on my participation.

* * *

(tr. 1087) * * *

Now Mr. Clontz, did you meet again with the de-

fendant, Junius Scales, in Durham on or about the 2nd of February, 1951, and discuss with him again the Jim Crow problem?

A Yes, I did. On that occasion I discussed with him the paper he was having me to write.

Q What did he say to you at that time about your paper?

A He said that it was an excellent work and complimented me on the excellent way in which I had written it.

Q Now who were you writing this paper for?

A I was writing that for the use of the Communist Party. Scales, in turn, was to forward it for possible publication to the National Party Headquarters, and it would be used in Communist teachings and propaganda throughout the country.

* * *

(tr. 1088) * * *

Q At this time, that you met with the defendant, some time around the 2nd of February of 1951, state whether or not you had a discussion with the defendant relative to the Korean War, and whether or not it had affected him in any way in his work or activities.

A Yes, the defendant, Scales, told me that he had noticed a marked change in the attitude of the people around Carrboro and Chapel Hill. He said that they were noticeably more friendly to him, and he said that the reason for this was they were trying to get in good with him because they were afraid the United States would lose the Soviet war and he would be able to put in a good word for them when that happened.

Q Mark this, please, as No. 57.

(tr. 1089) (The Clerk so marked a document as Government's Exhibit No. 57 for identification.)

BY MR. GAVIN:

Q At that time, on or about the 2nd of February, 1951, did you secure from the defendant another copy dated January the 26th, 1951, of "For a Lasting Peace, For a People's Democracy"?

A Yes, I did.

Q Is that the copy which you obtained from the defendant?

A Yes, this is marked in the border "Received of Junius Scales, February 1, '51," bears my initials, which I initialed before passing on to the F.B.I.

Q Did you mark that at the time or immediately after receiving it from him.

A Yes, I did.

Q Did you pay him for that, or did he give it to you?

A No, he explained that that was one of the free things that could come in from the Soviet Union, that was an assistance, and I never paid him for one of those, to my recollection.

MR. GAVIN: Your Honor, we offer that as Government's Exhibit No. 57.

THE COURT: The one just previously was offered, I believe, too, was it not?

(tr. 1090) MR. GAVIN: Yes, sir.

THE COURT: Let them both be admitted.

(The Clerk so marked two documents, each entitled

"For a Lasting Peace, For a People's Democracy," as Government's Exhibits Nos. 56 and 57 in evidence.)

* * *

(tr. 1100) * * *

Q Mr. Clontz, I believe I had just asked you about a meeting with the defendant, Junius Scales, on March the 3rd, 1951. At that meeting you discussed with him a transfer of your Party membership from North Carolina to New York. Will you tell us the substance of that conversation with the defendant?

A Yes. When I first brought up the question of going to New York, Scales had explained to me that there were two possible choices, that I might transfer to New York and become a Communist Party member in the New York District, or that I might remain under his optional supervision, paying my dues to him and in the Communist Party in North and South Carolina.

On this particular occasion he said that a transfer was a very complicated thing, that the National Party had put in very strict security regulations, that, as he pointed out, a letter of transfer would be worthless unless it openly identified me as a good Communist, and that that made it a dangerous document if the F.B.I. or someone (tr. 1101) like that got hold of it. So he said the rules were that only he or Farash could carry the letter of transfer to New York, or in the alternative, one of the top Communist leaders of the Secretariat, or the National Committee down in North Carolina could carry it back.

He also explained to me that I had not been a member of the Communist Party long enough under their regular rules and regulations to transfer from one state to another, but he pointed out that many exceptions to the

rules have been made in my place because of my being such a valuable asset to the Party.

Q Did he state whether or not Doxey Wilkerson could assist you in this transfer?

A Yes.

Q If so, how?

A He said that Doxey Wilkerson, who was the official liaison officer between the Jefferson School and Communist Party Headquarters, in addition to being Director of Curriculum, was in close touch with Communist Party leaders in Headquarters in New York, and said that I could count on Doxey Wilkerson to help me integrate my own personal efforts into the workings of the Communist Party up in New York City.

Q Now did the defendant ask you why you were going to New York?

A Yes. Actually I had sprung the New York move on (tr. 1102) him as something I was considering. The F.B.I. was the one that had chosen New York as my sector of activity. I told Scales originally that law practice wasn't so good, and that a friend of mine with the insurance companies in New York City was urging me to go up and take a job. At that he was emphatic in insisting that I not leave North Carolina, and then I told him that I owed it to this friend of mine to at least listen to his proposition.

On this particular occasion in March of '51, I already had taken the job and Scales again told me how much he regretted my leaving, said that I was a unique and a valuable asset to the Party, being a Southern lawyer, whose Communist affiliations were hidden, and he expressed the feeling that he would need me here to defend

him when he was indicted under the Smith Act. He said that when the indictment started, the F.B.I. would be sure to grab him first.

* * *

(tr. 1104) * * *
BY MR. GAVIN:

Q Did you meet with the defendant, Junius Scales, and Hank Farash about a week later, to wit, about March the 8th, 1951, and discuss your going underground in New York City?

A Yes, I did. It was about a week later and it was about a week before I left for New York City on my permanent change of station. I met him and Farash both in Durham, North Carolina, as I recall, and we had conferences in my hotel room up in the Washington Duke Hotel.

Q Can you tell us what instructions were given to you at that time by either the defendant, Scales, or Hank Farash, if the defendant was present?

A I was instructed by Farash, or I should say I was cautioned by Farash, to watch my step in going up to New York. He warned me not to rush in and take too active a part in the Communist work. He told me, he meaning Farash, that he felt that I would be more valuable by staying Underground up in the Communist Party in New York, that I would remain under the operational direction of Scales, the defendant, and Farash, and that if I were to join one of the New York Party Clubs, they would be so enthusiastic at receiving me from the South that pretty soon they would expose me, and

that he felt that I was much more valuable in staying concealed until the time came when I would be useful at the time of the revolution.

Q Were you to contact any of the Party lawyers in
(tr. 1105) New York, Mr. Clontz?

A No. Let's see. Yes, originally Farash did tell me that he thought I should get in touch with some of the Communist Party lawyers, but Doxey Wilkerson countermanded his instructions later and told me to stay away from them.

Q Now did you see Farash again in New York City on or about May the 15th of 1951?

A Yes. I went up to New York around the 15th of March and started in my work there for the Association of Casualty and Surety Companies, and while getting established in the new work, and in my investigative work, I had been promised previously that either the defendant or Farash would contact me periodically in New York. In May of 1951 I received my first visit from Henry Farash, the Party Organizer, who contacted me there in New York City.

* * *

(tr. 1106) * * *

BY MR. GAVIN:

Q How did you pay your dues while you were in New York, Mr.—

A Well, during the initial period I paid dues by mailing money orders payable to Junius to an address he furnished me. However, Scales explained to me that I could pay my dues to either him or Farash when either of them were in New York.

Scales had previously identified Farash as the Party representative working under his direction in North and South Carolina. Initially he called him his personal sec-
(tr. 1107) retary, but later he identified him as the Party Organizer working under his jurisdiction.

Q. Did you ever effect a transfer of your membership to New York?

A. No, I did not. I was told by the defendant that the matter would be given consideration by him and Farash, and that the final determination was that I would remain under Scales' operational control throughout my time up in New York City.

* * *

Q Mr. Clontz, what is the A.C.L.U.?

A The A.C.L.U. is the American Civil Liberties Union.

(tr. 1108) Q What is that organization?

A Well, that organization actually is of a nationwide scope. Its headquarters is up in New York City.

Q Did you ever discuss that organization with the defendant, Junius Scales?

A Well, that is one of the things the defendant told me that I should do for the Communist Party. He told me that the A.C.L.U. had originally been formed by some of the leaders of the Communist Party along with other people interested in civil liberties. He said that lately, though, the A.C.L.U. had thrown out known Communists from its ranks, including, he mentioned Elizabeth Gurley Flynn, who was one of the top Communist eleven leaders, and he told me that he had been requested by Party Headquarters to have me get in with the A.C.L.U. organization to report on what value they might

have in the coming struggle, in view of the fact that they seemed to have gone so far afield from the principles the Communist preferred.

That was one of the organizations that he suggested that I attempt to infiltrate up in New York City to make reports to him on.

Q That was on May the 19th, 1951, that he made that suggestion to you, did he not?

A Yes, sir.

(tr. 1111) * * *

Q Now, Mr. Clontz, did you meet Junius Scales again on September 14th, 1951, at Harvey's Cafeteria in Durham.?

A Yes, sir; I did.

Q Had you come down from New York for that meeting, sir?

A Yes, sir; I had come down from New York and made arrangements to meet him in Harvey's Cafeteria. He telephoned me at my hotel and said that while he didn't think the F.B.I. were on his tail, we still should simply appear to meet coincidentally at the Harvey's Cafeteria there, and that we that way could get to-

(tr. 1112) gether.

Q What did he tell you at that time about the steps that he and Henry Farash had taken towards going underground?

A The defendant told me that, first of all, he had been, he and Farash, for quite a period of time, had been bothered by a surveillance of F.B.I. agents, that he and Farash had sold the Communist Party car that I had arranged for them to get, and had bought another one, to make

identification more difficult.

He commented that they had bought a powerful enough vehicle that they could get away from the F.B.I., and that Farash was staying on the run.

Q Did he make any comparison or state to you the Communist Party—strike that, please.

What did he tell you about the Communist Party in the United States benefiting by the mistakes made on the part of the Communist Party in Germany?

A Defendant, Scales, said that Hitler had completely disrupted the Communist Party in their operations by disrupting their communications and just messing all their plans up, but he said that the Communist Party here was planning ahead, and benefiting from the experience of the Communist Party in Germany, and that, accordingly, they were setting up underground means of communication, and that that was one of the things they were working on then, to prevent the breakdown of the (tr. 1113) flow of information and communication between the field and Party Headquarters in New York.

Q What did he say about the Communist Party in the United States being prepared in the event of war, Mr. Clontz?

A Well, he commented that if war came, that they would be ready. He commented as a matter of fact that if war came, I probably wouldn't see him again, that he would be underground and that just not to look for him.

Q Now do you recall him comparing the Party with an iceberg?

A Yes, I do. He made the remark, which I later repeated to Doxey Wilkerson, that the Communist Party, particularly in that period of time and in the South was growing more and more like an iceberg with a tenth of it or a hundredth of it above the surface but the vast majority of it hidden and concealed underground.

Q How long had the party been preparing for this underground movement, Mr. Clontz?

A He told me on that occasion that they'd been preparing since the early thirties. He told me that he knew of one particular comrade back in the early thirties when Communism was regarded as somewhat sophisticated in some circles, had suddenly been ordered to quit his job, transfer to another section of the country, and completely sever all ties he had with communism or with anything leftist, that these (tr. 1114) Party members that were underground were not to contact the Party but were to wait for the word from the Party, that when the time came the Party would contact them.

* * *

Q Now, Mr. Clontz, do you know James Jackson?

A I don't know him personally. He is one of the leaders of the Communist Party. Scales mentioned that James Jackson, who at that time was a fugitive from justice having skipped bail up in New York, he mentioned James Jackson as a friend of his, and said that he didn't want to go underground unless he had to, but that James Jackson and the other fugitives that had eluded the F.B.I. were proof of the fact that you could go underground without getting caught.

* * *

(tr. 1117) * * *

Q Mr. Clontz, I believe at the close of testimony yesterday I asked you if you knew Communist leader James Jackson.

A Yes.

Q Did you identify James Jackson?

A Yes, sir. James Jackson was one of the Communist Party second string leaders, who was at the time Scales discussed him in September of 1951, a fugitive for whom the F.B.I. and other Government agencies were searching. Jackson was the one about whom Scales said that Jackson's ability to stay lost was comforting because it showed that one could go underground when it was necessary.

Q Now this was told to you by the defendant in your September, 1951 meeting with him, was it not?

A Yes, that is correct.

(tr. 1118) Q Now what, if anything, did the defendant say about your communicating with him in the event of war?

A The defendant told me that if war was declared, I should make no efforts to get in touch with him because he would be gone. He told me that I should maintain my contact with National Party Headquarters through Doxey Wilkerson, liaison man between the Jefferson School and Communist Party Headquarters.

Q Did he tell you what you should do about going underground, or what arrangements you should make?

A Well, Scales told me that I should stay underground to be available for the Party in time of emergency. He said that the Communist Party thought much more of a mem-

ber such as he thought me to be, that was, as he put it, on ice, and not spotted as a Communist.

Scales told me that the Communist Party's primary objective at that time as building up what he called contacts inside mass organizations, such as, the N.A.A.C.P., the National Association for the Advancement of Colored People, and that their secondary goal or immediate objective was building up secret communications network throughout the country.

Q Was there at that time, or was there to be any prohibition against the use of telephones and communications, Mr. Clontz?

A Well, he told me that in line with the secret communi-
(tr. 1119) cations that instructions had been put out from National Headquarters by, as I recall, John Gates, the editor of the Daily Worker, who spoke down here in North Carolina on the occasion about which I testified, and I don't remember all of the instructions, but he said that John Gates had specifically warned against using the telephones in any kind of correspondence or communication between Communists.

* * *

(tr. 1119) * * *

Q I hand you what has been marked Government's Exhibit 60 for identification and ask you if you will identify that, please sir?

A This is the letter which I received on September 17,
(tr. 1120) 1951, from Junius Irving Scales, the defendant. The letter was sent in an envelope addressed to me, Mr.

Ralph C. Clontz, Jr., Hotel Rueger, R-u-e-g-e-r, Richmond, Virginia. It was sent air mail special delivery, postmarked Chapel Hill, September 3rd, looks like September 13, 1951. The letter itself bears no letterhead. The date is 13 September, '51.

"Dear R.:

"Decided against meeting for two reasons. No. 1, urgent and unforeseen duties in next four days at widely scattered points, and No. 2, I don't think it's worth the risk to you (on the latter point I have additional reasons for concern since I saw you). You will be reached eventually. Meanwhile, there is no reason why you "- - correction- - " there is no reason you should not play a progressive role in the mass organization which you recently joined, and in broader political doings in your bailiwick, that is ALP—referring to American Labor Party—local committees" close parenthesis. "Let your status remain the same otherwise for the time being, you have excellent sources of advice available up there, but such meetings are a luxury at this time and I urge that you follow up the possibilities in the new organization, investigate them (tr. 1121) thoroughly for the role you can fill, and go to work on your own. I want to reaffirm what has been discussed previously about not exposing yourself. It is my impression that you are becoming reckless. Let's eliminate letters, telephone calls, telegrams. Other means of communication are slower but better. Thanks again for your invitation. Best regards from family. J."

The entire letter is typewritten, including the "J" at the bottom. No handwritten, other than an insert of one word

"duties" which is printed up at the top.

Q We offer that letter as Government's Exhibit No. 60, sir.

THE COURT: Let it be admitted.

* * *

(tr. 1122) * * *

Q Did you attempt to get in touch with the defendant, Scales, about Christmastime in 1951?

A Yes, I - -

Q Did you see him at that time?

A No, in December of '51 I did not see him. I had been instructed by the defendant that I could contact him through his second wife, Gladys Meyer, M-e-y-e-r, Scales, and when I called his residence in Carrboro, I was unable to reach him, but did later reach his assistant and wife, Gladys Meyer Scales.

Q You called her his assistant, Mr. Clontz?

A Yes, sir.

Q Will you state what her duties were.

A Well - -

Q What her title was, if anything, in the Party.

(tr. 1123) A Well, as it was explained to me, she was in charge while the defendant was underground, and running—she was there; for example, I was instructed by the defendant to leave any messages for him with her, and, in turn, I was to pay my Party dues by sending them to her and she, at least on one occasion, I recall specifically, took care of giving me receipts for my Party dues which, in turn, she had had the defendant to sign.

Q Did you pay Party dues to the defendant's wife?
A Yes.

* * *

(tr. 1125) * * *

Q Now will you go ahead and tell what Gladys Meyer Sacles—

MR. SMITH: Same objection.

MR. GAVIN:—told you relative to the defendant, where he was—

THE COURT: Objection overruled.

BY MR. GAVIN:

Q Where you could get in touch with him?
A On what occasion was that that you refer to?

Q That was about March 18 of 1952, I believe, Mr. Clontz.

A On March 18 of '52 I had come down from New (tr. 1126) York to attempt to contact the defendant. I contacted Gladys Meyer Scales, as I recall. She and her mother went out and ate supper with me in Durham at the Little Acorn Restaurant. She told me then that the defendant, Scales, had been ordered by the National Party Headquarters to stay underground, that she, herself, had not been in contact with him, but she had been left there to try to hold things together while he was underground, that F.B.I. surveillance had made it necessary for him to go underground because he couldn't carry out his functions in the Party without disappearing.

She told me that the defendant had sent me instructions that—

Q Sent you instructions how?
A By her.

Q All right, sir.

A That I was to make my contact with the National Committee of the Communist Party with reference to getting into underground activities through Doxey Wilkerson; to whom he already had referred me.

And my recollection is hat it was on that meeting around the 18th of March, '52, that she gave me a receipt that Junius in turn, had given her for me.

Q Now state whether or not, Mr. Clontz, Gladys Scales told you that the defendant had instructed her to tell you that your correspondence with him should be carried on (tr. 1127) through her, Gladys Scales.

MR. SMITH: Same objection, and also on the grounds of leading—

THE WITNESS: Yes. Yes, she told me, as I already had been instructed, that Scales' arrangements were that any communications I had for him I was to give her, that she in turn would give them to Scales, and would send me Scales' replies.

Now she had explained that she actually had no way of contacting the defendant herself, that her only means of communication was Scales getting in touch with her through someone in Chapel Hill, that he wouldn't even call her long distance, and, therefore, she would have to serve as the agent through which I would deal with the defendant, Scales.

BY MR. GAVIN:

Q Now did you go to Carrboro and see Gladys Meyer Scales on or about March 20th, of 1952?

A Yes, that was a few days after this particular meeting. On that occasion I contacted her, and it was at that time that I turned over a comprehensive report on my duties, I had performed for the Communist Party in New York City including my infiltration of various organizations.

She in turn accepted the report, said that she would (tr. 1128) pass it on to the defendant.

Q Who was that report for, Mr. Clontz?

A That was for Junius Irving Scales, the defendant, in that I was still under his operational control.

* * *

(tr. 1132) * * *

Q Mr. Clontz, I hand you what has been marked for identification as Government's Exhibit 62, and ask if you know what that pamphlet is?

A That is a publication called, a newspaper, by the defendant, The Textile Workers' Voice.

(tr. 1133) Q Where did you obtain that?

A I am not certain if this particular one was obtained by me.

Q Have you ever seen that before, sir?

A This particular publication was identified to me by the defendant and he did furnish me various copies of The Textile Workers' Voice. This was a publication published by the defendant and the local Communists in an attempt to influence or infil—

MR. SMITH: If Your Honor please, I object. If it is a paper, writing, it speaks for itself. I don't think the witness ought to be allowed to characterize it or draw conclusions from it.

THE WITNESS: I am sorry. The defendant explained to me that this was the Communist Party newspaper locally, that was used to attempt to influence members of the union in Irwin Cotton Mills and other mills there in Durham, to become interested in the Communist Party.

* * *

(tr. 1138) * * *

Q Now, Mr. Clontz, I hand you what has been marked as Government's Exhibit No. 63 for identification, and ask you if you wil lexplain to the Court and the jury what that is, sir.

A This is the May, 1950, issue of The Textile Workers' Voice. This is the identical document that I received from the defendant, Scales, through the mail on June the 6th, 1950. This was addressed to me, Ralph C. Clontz, Jr., 2304 Irwin Road, City, and was mailed in Durham, North Carolina.

* * *

(tr. 1149) * * *

Q Mr. Clontz, I hand you what has been marked for identification as Government's Exhibit No. 64 and ask you to state what that is and where you got it.

A This is a publication entitled, Preconvention Discussion Bulletin, issued by Communist Party U.S.A.; as written on the margin in my handwriting, I received this from the defendant, Junius Scales, Durham, North Carolina,

Room 1205, at the Washington Duke Hotel, December 15, 1950.

Q All right. Let me have it.

Now I hand you what has been marked for identification (tr. 1150) as Government's Exhibit No. 65, and ask you, please, to identify that article.

A This document is entitled New Times, a weekly journal, published by the newspaper Trud, Moscow, that was given me by the defendant, Junius Irving Scales, also in the Washington Duke Hotel on March 3, '51. It bears that indication and my initials, which I made on the document shortly after it was given me by the defendant.

Q I hand you what has been marked for identification as Government's Exhibit No. 66, and will ask you, please, to identify that article.

A This is a pamphlet which I received from the defendant on March 3, 1951, also in Durham, in the hotel. It bears my initials.

The pamphlet is entitled I Saw the Truth in Korea, by Allen Winnington, W-i-n-n-i-n-g-t-o-n, Daily Worker Correspondent in Peking, just returned from the Korean front. Facts and photographs that will shock Britain.

Q Now, Mr. Clontz, you have testified that you received these exhibits which are pieces of literature, as well as certain other exhibits, pieces of literature, from the defendant. What instructions did the defendant give you as to what you should do with the literature that he furnished you?

* * *

(tr. 1151) * * *

THE WITNESS: As I was answering, the defend-

ant from the initial contacts with him in 1948 on occasions sold and on other occasions gave me literature that he said was the official literature of the Communist Party. He told me that first of all as a good Party member I was required to buy a certain amount of literature to show my interest in the Communist Party and its goals. He also mentioned that the money from purchase of some of the literature went to support the Communist Party, and that he, himself, made a commission on some of it.

He instructed me to read the literature that he either sold or gave me for my education as a Communist Party mem-
(tr. 1152) ber. My instructions were that by reading the Communist literature, I would know what the Communist Party was doing, know what their official policy was, and it would help me prepare myself as an all around Communist, even though I was to remain underground, and it would help prepare me for the time when the Communist Party would call on me in time of crisis.

BY MR. GAVIN:

Q Now, if your Honor please, the Government will offer in evidence Exhibits No. 64, 65 and 66, which I understand you will reserve your - -

THE COURT: Suppose you let me have them after they are marked.

MR. GAVIN: They have been marked.

* * *

(tr. 1157) * * *

Q I want to direct your attention to certain organizations which you mentioned in your testimony yesterday, particularly, the A.C.L.U.

A Yes.

(tr. 1158) Q And the N.A.A.C.P.

A Yes.

Q And ask you if you took any action in those organizations in response to the advice given to you either by the defendant or by Doxey Wilkerson?

A Yes, as I testified either yesterday or today, when I had my conference with the defendant in September of '51, he told me of the dual purpose of the Party at that time, of establishing contacts in mass organizations, and also during '50 and '51, when I was preparing to go to New York, I was instructed by the defendant and Farash to infiltrate, to get into certain organizations, and when I asked them which ones, the defendant recommended the A.C.L.U. for the reasons that I testified about yesterday. The Communist Party wanted someone to report on whether it could be counted on as aiding the Communists.

But the defendant told me to go to Doxey A. Wilkerson for guidance in which organization I could best infiltrate, so that in the year 1951—I don't recall—it was towards the latter part, I contacted Doxey A. Wilkerson and Doxey first advised me as to the peace organizations.

The Communist Party, he explained to me, was using peace as one of their tactics to try to get support of the working class, the Negro nation, and of the public generally. Included in this peace campaign was the action of the Com-
(tr. 1159) munist Party here in North Carolina, and throughout the United States, to oppose the Korean War, the Party position being that it was a war started by the United States and the capitalists, so my first organizations I was told to attempt an infiltration or a joining with, were peace organizations in New York.

However, I never actually did anything other than attend rallies that were suggested by Doxey Wilkerson, because on one occasion he sent me down to join a peace organization and from the time I left his office until I got approximately a mile away by subway, the organization had gone out of existence, and they were putting another name on the door.

He next suggested that I follow through the defendant's suggestion about infiltrating the A.C.L.U., and I went up to the American Civil Liberties Union Headquarters in New York, only to find out that it was not the sort of organization the defendant apparently had thought, had said it was; but that it did not have an active chapter that I could successfully infiltrate. I reported this to Doxey Wilkerson and, in turn, he suggested that I infiltrate the National Association for the Advancement of Colored People. He told me that the Communist Party did not have a majority on the National Board of the N.A.A.C.P., but that they had a strong minority, and that I could assist the Communist Party by getting into one of the local N.A.A.C.P. organizations in New York.

(tr. 1160) I recall that Doxey first sent me out to Jamaica, New York, to meet the N.A.A.C.P. Chairman of the Jamaica Branch, but when I got out there, I was very hostilely received and was informed that they weren't meeting, which I reported to Wilkerson. Wilkerson's remark was that they must have suspected that I was a Communist, and he cautioned me not to let any of the N.A.A.C.P. people in the leadership know of my Communist connections because the very purpose was to get me into the N.A.A.C.P. without their knowing that I was a Communist.

He then directed that I contact the Nassau County

Branch of the National Association for the Advancement of Colored People, and its headquarters, as I recall, was in Hempstead, H-e-m-p-s-t-e-a-d, Long Island, New York, which was about twenty miles away from where my family was living in Wantath, W-a-n-t-a-t-h, Long Island.

I contacted the N.A.A.C.P. leaders out there, and did under the direction of the Communist Party, join that particular branch. I made regular reports on my work in infiltrating the N.A.A.C.P. Branch, and these reports were made to Doxey Wilkerson, as well as to the defendant, Scales.

I did rise to a position of leadership. I was elected on the Board of Directors of the Branch of the N.A.A.C.P.

Doxey Wilkerson reported to me that there was a struggle taking place out there, and an attempt to take over that particular branch by other Party members who were work-
(tr. 1161) ing out there, and I was instructed to go in and help them take over control.

It happened during that time that a member of the National Committee of the N.A.A.C.P. identified to me by Wilkerson as Gloster Current, G-l-o-s-t-e-r, C-u-r-r-e-n-t, was very rabidly anti-Communistic and, accordingly, it was suggested by Wilkerson that I join with the Communist elements in Nassau County, and join them in an attempt to oust Gloster Current and to discredit him before the National Board.

At the time Gloster Current, who was Director of Membership on the National Board of the N.A.A.C.P., was attempting to revoke the charter of that branch because of what he alleged and what was attempted, the Communist domination of the branch. In the course of that meeting, in the course of that struggle, rather, I was directed by Wil-

kerson, so far as advice was concerned.

I came in contact with National leaders of the N.A.A.C.P., and was complimented quite highly by Wilkerson on my efforts to discredit the anti-Communist elements in the N.A.A.C.P.

During that period, which culminated in, around March of 1952, I was told by Wilkerson that a struggle, terrific struggle was taking place inside the National Headquarters of the N.A.A.C.P., and that they were having difficulty in taking over the N.A.A.C.P. to use it. It was also during (tr. 1162) that period that I made my full written report to the defendant, Scales, which report I previously had discussed with Wilkerson.

Now in addition to the N.A.A.C.P., I was instructed by Wilkerson to become active in the local organizations in my community, and I was a member of the Board of Directors of the community organization known as the Forest City Community Association, or the Forest City Association. I was instructed by Wilkerson to look for any opportunity to carry out the Party purpose, by my not being revealed as a Communist member; he pointed out in the N.A.A.C.P. that I could advocate things the Party stood for without being what he called Red-baited, where a person that was tabbed as a Communist would immediately be shouted down.

Now one of the other organizations that Farash had instructed me to infiltrate was the Civilian Defense setup, but I never actually made any efforts to infiltrate that organization.

* * *

(tr. 1164) * * *

Q Now, Mr. Clontz, you have testified to joining

certain organizations at the instructions of Doxey Wilkerson and the defendant. Do you know whether or not other Party members joined those organizations with you?

A Well, they didn't join them with me, as I have testified. I was instructed by Wilkerson to assist the Communist Party members who already were in the Nassau County (tr. 1165) Branch of the N.A.A.C.P., who already were waging the struggle to take over the branch. There wasn't a matter of their joining with me.

* * *

(tr. 1168) * * *

Q Mr. Clontz, was your action in the American Civil Liberties Union and in the N.A.A.C.P. taken pursuant to the instructions given you to put theory into practice?

A Well, partially. Now, as I have testified, I didn't actually take any part in the A.C.L.U. The defendant had instructed me to, but I found as a practical matter that there was no A.C.L.U. Branch that I could infiltrate.

Now my action in infiltrating the N.A.A.C.P. was taken as one of my Communist Party assignments that were given me officially by the Communist Party, by Scales, and by the person he designated as my liaison between Communist Party Headquarters and myself, Doxey Wilkerson, and it was a sort of action that Wilkerson described as putting theory into practice.

(tr. 1169) Q Now was anything said to you by either the defendant or Doxey Wilkerson, or any of the other National Party leaders about these activities, serving to achieve the ultimate goal of the Communist Party?

A Well, as I have already testified, the defendant told

me in September of '51, as I recall, that that was one of their goals in attempting the mass contacts, and Wilkerson on numerous occasions told me that this infiltration program into the N.A.A.C.P. was one of their attempts to win over the Negro people, that he called the Negro nation, and his attitude was if you can get people to go part of the way with you, then go with them that far, and you may later bring them all the way into the Communist Party.

As an example, Wilkerson described to me his somewhat undercover activities as a professor in college. This was back during, as I recall, it was in the summer of 1951. He said that I, as an undercover Communist, was somewhat in the same position he had been in when he was a professor at Howard University in Washington, D. C. He was not allowed to preach communism from the platform as a college professor, but that he was able to reach the students in discussions and other out-of-class activities, and I recall his saying that many of the students he had under him at the time he wasn't openly known as a Communist were now strong Communists supporting the Party.

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## TESTIMONY OF OTIS R. REAVIS

### DIRECT EXAMINATION

* * *

(tr. 1303) Q Did you meet Junius Scales on or about March 24, 1949?

A Yes, sir; I did.

Q Would you relate briefly the circumstances of your meeting?

A He came to see me about a Communist Party transfer card. I was being transferred into the area and he came to me with a Bernie Friedland.

Q Now, who was Bernie Friedland?
A He was a Party D.O.

Q For North Carolina?

* * *

(tr. 1304) * * *
Q You used the word "D.O." What is D.O.?
A District Organizer for Communist Party.

* * *

(tr. 1305) * * *
Q Now what did you say you discussed with Scales on your meeting on March 24, 1949?
A He asked me if I had been in the Party before, and that is the Communist Party, and I told him I had, and he (tr. 1306) asked me if I had a transfer. I had written previously to Bernie Friedland and telling him I was interested in the Party in this area, and they asked me for my transfer card. I am not positive whether it was that first meeting or not, but anyway, I gave them the transfer card either at that meeting or previous to that.

* * *

(tr. 1306) * * *
Q Now did you again see the defendant, Scales, on or about April the 26th, 1949?
A Yes, sir; I did.

Q Would you state to the ladies and gentlemen of the jury what that occasion was and what transpired?
A Well, he asked me if I'd be interested in going to a school, a Social Science, I believe he gave me, a school, and it would be in a large city on the East Coast. He didn't name the city. And that he wanted to know if I would go.

I didn't give him a definite answer at the time.

Q Now did he tell you how to give him an answer in case you decided to go?

(tr. 1307) A Yes, sir; he gave an address to write.

Q Well, now did you at a later time advise him that you would go?

A Yes, sir; I did.

Q Would you state what arrangements were made for your expenses for that trip?

A All my expenses was to be paid by the Party to go to this school, and all my meals be taken care of, and at the school it was pointed out that we could receive doctor's treatment and we would be assigned places to stay.

Q Now do you recall when you actually left for the school?

A Not exactly when I left. I was supposed to be there on the 9th of May.

Q 1949?

A 1949.

Q Now were your expenses for the trip paid to you before you left?

A Yes, sir; they were.

Q By whom?

A Bernie Friedland.

Q Were arrangements made for that payment in the presence of the defendant, Scales?

A I don't recall him being at that meeting. I recall just Bernie Friedland.

(tr. 1308) Q Did the defendant, Scales, tell you that

the expenses would be paid by the Party here in this state?

A Yes, sir; they would.

Q Were you given any instructions by the defendant, Scales, as to what you were to tell your friends and relatives at home as to why you were going to New York?

A Well, on our first meeting, when I pretended not to want to go to the school, I gave the excuse I didn't want to have another incident or anything that would be found out, and so he advised me to tell my friends when I left for the school, to tell them I was seeking employment.

Q In New York?

A That's right.

Q Now did he give you any instructions, defendant, Scales, give you any instructions as to whom to contact when you got to New York?

A Yes, sir; he did.

MR. WILLIAMS: Your honor, I would like this marked as Government's Exhibit--

THE CLERK: This will be 69.

(The Clerk so marked the slip of paper as Government's Exhibit No. 69 for identification.)

BY MR. WILLIAMS:

Q Mr. Reavis, I hand you here what has been identified as Government's Exhibit No. 29—

(tr. 1309) THE CLERK: 69.

MR. WILLIAMS: 69. I am sorry.

BY MR. WILLIAMS:

Q Would you examine it and tell us what it is?
A These are my directions I received as to where to go in New York, and who I was to call for, and what I was to do in case of an emergency.

Q Now from whom did you receive those?
A It was given to me by Junius Scales.

Q You have your own handwriting on the back, setting forth the time, and so forth?
A Yes.

MR. WILLIAMS: Your Honor, I would like to read this to the ladies and gentlemen of the jury.

"Monday, May 9th, 1949. Before noon, Jefferson School of Social Science, Sixth Avenue at Sixteenth Street, go to building without package, ask for Hy Gordon—in emergency go without package to 35 East Twelfth Street, ninth floor, ask for Betty Gannett or Jack Kling."

And on the back is, "Given to me by Junius Scales when I went to school in New York, J.S., Box 62, Chapel Hill, North Carolina."

BY MR. WILLIAMS:

(tr. 1310) Q That is in your handwriting, the back part?
A Yes, sir; that is my handwriting.

* * *

(tr. 1310) * * *

Q Now what were you told about your expenses while you were in New York, Mr. Reavis?

MR. SMITH: By whom and when?

BY MR. WILLIAMS:

Q Told by the defendant, Scales, if anything?

A They would be taken care of after I got to New York; someone at the school would take care of those.

Q All right.

Did you go to New York?

A Yes, sir.

Q As you planned, and what day did you arrive there?

A It was on the 9th of May, '49.

* * *

(tr. 1312) * * *

Q The questions I am going to ask you relate to the school. If you feel that you need to refer to your reports, I want you to feel free to do so.

Do you recall taking a course there called Capitalism and Imperialism?

A Yes, sir.

* * *

(tr. 1313) * * *

Q What other courses were you taught there at the school? Were you taught anything relating to infiltration of organizations?

A Yes, sir. We were taught that the Communists should

always be willing and able to go into any organization and to work with the masses and work with any group, whether we could see eye-to-eye on any views they might have, to work and be part of the masses and provide leadership.

* * *

(tr. 1314) * * *

Q Now what were you taught in the course of Capitalism and Imperialism?

A Well, capitalism and imperialism was the two main forces that were in the world today as we knew it, and the Party advanced the view that they could live, coincide, at one time, and at again they would say they couldn't. It was back and forth and—but they would advance views on both sides, so that I got the feeling that it was so you'd be (tr. 1315) prepared to defend yourself in any kind of situation.

Q Well, did they teach you at what stage capitalism had reached in the world and in this country?

A Yes. It had reached what they called deteriorating stage.

Q Describe what they meant by that.

A Well, we were given an illustration of what the leader of China, Communist China, had advanced. I don't recall his name. He said that United States was likened to a giant, and that all the capitalist countries of the world was resting on this giant's shoulders and once the giant had been fallen, that all the capitalist countries of the world would likewise fall to the China.

Q Did they teach you what would be necessary to fell this giant?

A Well, they would teach it in the way that you knew

to go with the masses and work with them, wherever, whatever organization they might be in, and to be willing to seize any situation, or proceed on any avenue, until you reached an obstacle, and if you couldn't remove the obstacle, your advance would be constant, made constantly to socialism, and if you couldn't remove the obstacle on the avenues as illustrated, you would proceed on another direction, but always keeping in mind that socialism was your ultimate goal.

Q Did they tell you what other direction that would be?
(tr. 1316) A I don't understand the question, I don't believe.

Q Did they tell you what other direction would be necessary to fell this giant that they described was America?

A Well, the giant—well, they gave another illustration likened to a dragon and he was in the deteriorating stages. A lot of people might get hurt by a dragon that had been fallen, by the situations in the world today, and the way that things were, it's just like a dragon dying that people get hurt, but, and you should prepare yourself to take care of yourself in these situations.

They—we took the text of that line of thinking from books, but that was just an illustration that I recall in my mind. It stood out more than the passage from some of the books that we took our references from.

Q Mr. Reavis, where, primarily, did the students at this particular course that you had come from?

A Throughout the South.

Q Were they all from Southern States?

A That's what we were told.

Q Were you given a course in Negro History by Eliza-

beth Lawson?

A Yes, sir; I was.

Q Would you state briefly what you were taught in that history course?

A Well, we were, we understood, that we felt that the (tr. 1317) Negro people was the only revolutionary group within the United States that we could ally themselves with, and hope to reach their gains through the avenue of force and violence, by overthrow of the Government, by Proletariat faction, that they gave us several different views on the Negro question.

It was covered about as well as any course I think that was at the school.

Q Were you taught that the Negro people of the South were entitled to form a Negro nation?

A Yes, I was.

* * *

(tr. 1317) * * *

Q Were you told of your purpose in being taught that course?

A We were told that Negro people was a people that had been brought by slavery into this country against their wills, and then they had never reached the point of freedom; they were still being exploited even though the laws made it appear that they were free. They deserved the right to be a free nation, and they—there was an illustration that there was a black veil that lie—I am not positive of the boundaries of it—it's in one of the books, I think I brought back—it lies from near Maryland to Mississippi. That is the (tr. 1318) way I remember the map, it lay along the mountain range two hundred miles in either direction. Some areas

are spotted. They are different localities where it is predominantly Negro, that these people were being exploited by the factions and the Government of the United States, and that they deserved the right to be free that if—we discussed it in our class; everyone advanced views on it—if we decided that it constituted a nation, that they thought it would be advanced by Joseph Stalin at the time to the United Nations that this nation be a free nation, if all the views that they had constituting a nation were fulfilled in this group in the Black Belt.

Q Well, now were you told to go back into the Southern Region and to expound that story to the colored people, tell them about it?

A You were expected to seize any situation that would lead to your gain, ultimate gain of socialism. You didn't get yourself out on a limb by pointing this out and putting yourself in a position of being pointed out as a Communist, but you seize any situation, if you seen people going in the right direction, you encouraged them. If they went in the wrong direction, you would try to steer them right.

You would not get up and get yourself out on a limb by leading them in the way that you might be accused of Communist.

(tr. 1319) Q Were you told particularly to point out the various means of oppression of the Negro people in order to recruit them into the Communist Party?

A Well, they were—you had to point out to them that they were being oppressed, that they were only given menial jobs and labor, and that every faction of this Government which all factions are corrupt in a capitalist form of Government to their point of view, but you were to—I got my-

self lost there. I am sorry. Could I hear the question again, please?

(The reporter read the question.)

A Well, we were to point them out in a way to let them know that they were being oppressed and to let them know that we were their friends and their allies, someone that they could trust in, and we would lead them to a better way of life, not pointing out what that way of life was, but leading them and letting them know that they were with their friends and allies.

Q Was that to be for the purpose of recruiting them in the Communist Party, as an ultimate goal?

A You never hesitate to recruit anyone into the Party. If you could see any way that you could bring them around to Party views.

Q Were you taught at the school what to do relative to participation in unions and in strikes?

(tr. 1320) A Yes, sir. We were told that a Communist always joins any union, whether it might be a union to—that it was, as they label, a company union or—let's see what other—they had different labels for the different type unions, whether it was C.I.O., A.F. of L., they had them all in category, that they pointed out was the most progressive and the one that was the most Fascist-minded.

Q Were you told to go into the union wherever you might be and offer leadership, provide the leadership for the union?

A Yes, sir; always be willing to accept leadership in the unions and always join the union, whichever may be representing the place of your employment.

Q Were you taught a course up there entitled The Struggle Against White Chauvinism?

A Yes, sir.

* * *

(tr. 1329) * * *

Q Mr. Reavis, turning back now to the Jefferson School, or the completion of it, when you finished your work, your teaching, your course of instruction at the Jefferson School, (tr. 1330) did you return to North Carolina?

A Yes, sir; I did.

Q Did you then become a part of the regular Communist Group in North Carolina?

A Yes, sir.

* * *

(tr. 1330) * * *

Q Now getting back to the school for just one question, were you given any instructions up at the Jefferson School as to your own security, what you should do in guarding the security of the school?

A Yes, sir; we were told not to all leave the building as a group, looked like we might be in a school, or to go in ones and twos to lunch, not to carry any books. If we car- (tr. 1331) ried any books, to put them in newspapers; that we weren't to talk to people, that we live with, or were assigned to live with because they had their own particular business and they weren't interested in us, and we shouldn't bother them with our school activities or have, and our business, that we were doing in New York.

We weren't to write and give their return addresses unless we asked their permission, and there was others, i

don't recall them at this time.

Q Now you say you returned to North Carolina and became a regular member of the Communist Party organization in this state.

Did you become acquainted with a person by the name of Harvey Cox?

A Yes, sir; I did.

Q Was he an officer in your Party Club?

A Yes, sir; he was secretary-treasurer.

Q And did you hold an office, also, in that particular club?

A Yes, sir; I was Literature Director.

Q What were your duties as Literature Director?

A I was to receive literature from the defendant, Junius Scales. Sometime I would get it by person, by mail, or, and I was to circulate it through the Clubs, sell it, and if I could sell it to people outside of the Club without en-
(tr. 1332) dangering my own security, I was to do that.

Q Now at that time where were you working? Did you ha[illegible] employment?

A I think I was working at Myrtle Desk Company of High Point.

Q Did you later get a position at Western Electric Company in Winston-Salem?

A Yes, I did.

Q Did you discuss the prospects of a position over there with members of the Communist Party here in the state?

A Yes, sir; I did.

* * *

(tr. 1332) * * *

Q Did anyone tell you what to do relative to, or tell

(tr. 1333) you anything to do relative to signing certain documents upon employment relative to anti-sabotage or non-communism?

A Yes, sir; they did.

THE COURT: Now let us see who it was.

THE WITNESS: Do you want me to answer?

THE COURT: Who was it?

THE WITNESS: Harvey Cox, or the defendant. I'd like to explain this, if I may.

THE COURT: All right, sir.

THE WITNESS: At this time I wasn't meeting with Junie at the time that—I mean Mr. Scales at the time—sorry—and I was advised through Harvey to seek employment in Winston-Salem, first at Reynolds. I didn't get employment there and—

BY MR. WILLIAMS:

Q Now that is the R. J. Reynolds Tobacco Company?

A Yes, sir; and then I was advised to seek it at Western Electric, and at the time I think that I was advised to go there, I wasn't seeing the defendant. He was not meeting with us, and, but I was receiving my instructions at—first he told me it was Party instructions, and then later he told me that I was getting my instructions from Junius Scales, and later I bumped into Mr. Scales at Harvey's home and I— the report said I'd been getting or the advice I'd been getting was confirmed by him. I advanced the question on (tr. 1334) what I should do in case I did get employment there at Western Electric, and I knew it was a, Government work, what I should do in case I was asked to sign certain papers, and I was told to do the same, that they had when

signing a Taft-Hartley affidavit, to go ahead and sign them, that before they did, the defendant asked me if I had signed any papers that might be used as proof that I was in the Party, and I didn't remember any.

He told me to write The Worker, and send them a letter.

Q What do you mean by "The Worker"?

A The Daily Worker, that I was receiving, paper subscription. I was subscriber of—I am sorry—he told me to write them and tell them that I didn't know how the paper had gotten started to me, but I wanted it to stop, and so I could use that as evidence if there is ever brought up in court that I was never a Party member, that I didn't—I got The Worker, but I didn't know how it started. I didn't know anything about it.

Q Well, now were you told how you could continue to take the Daily Worker in someone else's name?

A Yes sir. I was to pay Harvey Cox for the subscription and I was to pick it up at his home.

* * *

(tr. 1335) * * *

Q Now about what period is this, first, if you can get down to about the approximate time?

A It was the latter part of '51.

Q All right. Now describe your meeting defendant, Scales, at Harvey Cox's home.

A Well, I was to see Harvey Cox on some Party business. I don't recall what it was. I called on him and his wife answered the door. They were living in an upstairs apartment, and we chatted for awhile there in the hall, Harvey's wife and I, and I told her I'd see them later, and I started to leave.

I had gotten half way down the steps and we were talking low, and the defendant came out and seemed to try to get back before I saw him, and she apologized, and that, he came out, and she—he said that was all right and he knew me, and it was all O.K., and we stayed and talked and discussed my status at Western Electric, and we had a game of chess, as I recall it.

Q Would you describe his appearance?

(tr. 1336) A Yes, sir; he had cut his hair off, I think, from the time I saw him previously, and I commented on it, and he said, yes, he'd changed his disguise somewhat, said, that he had thought about dyeing his hair, but he was afraid the rain might streak it, and he thought about losing or gaining weight, but he hadn't decided which one at that time; due to the high cost of groceries, he thought it would be better to lose weight.

Q I believe you stated that this was right towards the end of 1951?

A Yes, sir.

Q Was the defendant, Scales, at that time, was it common knowledge among the Party members that he was supposed to be undercover?

A It was, oh, our club, it was stated by he and the Party District Organizer at the time they left, that they wouldn't see us for some time. They didn't say how long, or why they were leaving. It was just left that way, and so we didn't see them any more. It was, oh, seems like maybe six months. It could have been more or less that I hadn't seen him.

* * *

## TESTIMONY OF OBADIAH JONES

### DIRECT EXAMINATION

(tr. 1363) * * *

Q Reverend Jones, directing your attention to 1947 specifically, April, 1947, did you attend a Communist Party Training School at that time?

A Yes, sir; I did.

Q When and where was it held?

A 1041-A North Grand Boulevard, St. Louis, Missouri, Communist Party Headquarters.

Q And was there a principal teacher at that school?

A Yes, sir; there was.

(tr. 1364) Q And this school was held during what period of time?

A It was held during the period between April 4, twenty-nine days consecutive, 1947.

Q Was there a principal teacher at this school?

A Yes, sir.

Q And who was this principal teacher?

A Man by the name of George Siskind.

Q Do you recall the first time you saw George Siskind?

A Yes, sir.

Q When was that?

A About a week prior to the school. I saw him at the Communist Party Headquarters.

Q And what was the occasion of your seeing George Siskind?

A We were having a Communist Party Committee meeting.

Q Did George Siskind speak at this meeting?

A Yes, he did.

Q W as he introduced by anyone?
A Yes, sir.

Q By whom was he introduced?
A He were introduced by Ralph Shaw.

Q Now Ralph Shaw, did he have any position in the Communist Party of the State of Missouri at that time?
A Yes, sir.

Q What position did he have?
(tr. 1365) A He was Chairman of the Communist Party of the State of Missouri.

Q Do you know whether or not at or about that time Ralph Shaw had another position in the Communist Party?
A Yes, sir.

Q What position?
A He was State National Committeeman and a member of the State Committee.

Q What did Shaw say at this time concerning Siskind?
A Shaw stated that Siskind was one of the early teachers of the Communist Party and what he was he owed it to him.

Q Did Shaw say why Siskind was in St. Louis?
A Yes, he did.

Q What did he say in that connection?
A He said that he was sent to St. Louis by the Communist Party National School Commission to conduct a school.

Q And what did—did Siskind speak at that time?
A Yes, sir; he did.

Q What did he say?

A Siskind said that he was sent there from New York to conduct a school and that he had no report to make, but he did, wanted to say that the Communist Party was a large organization and must have been very strong and powerful because the capitalists had done a terrific job trying to outlaw the Party. It hired numerous men to (tr. 1366) analyze the Constitution, see whether or not they could outlaw it, and if they did outlaw it, some of the men would be sorry.

Q What, if anything, happened after this meeting, Reverend Jones?

A We proceeded to register.

Q Well, now, directing your attention back to this Section Committee meeting, were there two meetings at that time?

A Yes, sir; there was.

Q What happened after the second meeting?

A After the second meeting?

Q Did you have a conversation with anyone?

A Yes, sir; I did.

Q With whom?

A Man by the name of Bob Manowitz.

MR. TAYLOR: Pardon me. What was the name?

THE WITNESS: Bob Manowitz.

BY MR. KEENEY:

Q Do you know whether or not Bob Manowitz had any position in the Communist Party at that time?

A Yes, sir.

Q What position, or positions did he have?

A He was instructor of the Communist Party at that particular time.

Q Do you know whether or not at or about that time he (tr. 1367) held any other position in the Communist Party?

A He'd been State Educational Director.

Q Of the State of Missouri?

A Of the State of Missouri, and a member of the City Committee.

Q What did Manowitz say to you at that time?

MR. TAYLOR: Excuse me, Mr. Keeney. Your Honor since this is again a new witness, I just want to note for the record our running objection to all this testimony as unconnected with the defendant.

THE COURT: All right, sir.

BY MR. KEENEY:

Q Now, Reverend, did you understand my question, what did Manowitz say to you at this time?

A Manowitz told me that there was going to be a meeting conducted, and that I was expected to attend the meeting, said the meeting would run from nine o'clock morning, five o'clock evening, and we was planning to give eight hours to the study of communism.

Q Did he describe it as a meeting, Reverend?

A School.

Q School?
A Yes, sir.

Q Now did you subsequently attend such a school?
(tr. 1368) A Yes, sir.

Q And when did you commence attending this school?
A On April the 4th, 1947.

Q And where was the first session held?
A The first session of the school was held at the Communist Party Headquarters, 1041-A North Grand Boulevard, St. Louis, Missouri.

* * *

(tr. 1369) * * *

Q Now directing your attention again, Reverend Jones, to the first class, who opened the first class?
A Bob Manowitz.

Q Do you recall what he said at that time?
A Yes, sir.

Q What did he say?
A Bob Manowitz stated that George Siskind had been (tr. 1370) sent to St. Louis to conduct a school and that the students would learn more about him as the classes would progress.

Q Did he say by whom George Siskind had been sent?
A He said he had been sent by the Communist Party National School Commission.

Q And did Manowitz say whether or not he would have any function at the school, meaning Manowitz?
A Yes, sir; he did.

Q What did he say his function would be?

A He said he would act as a Supervisor and co-teacher and that his function would be passing out literature and helping the students with their class work.

Q Now did Siskind speak at that time, Reverend?
A Yes, sir; he did.

Q What did he say?
A Siskind said that the Communists in this area, and generally all over had so much to learn that he was sent there from New York to teach them communism, and he said if a man was a doctor, he studied medicine; if he was a chemist, he studied chemistry; and since we were all Communists, we had to study the language of Marx.

Q Did George Siskind at that time indicate how long he had been teaching Marxism?
A Yes, sir.

Q How long did he say?
(tr. 1371) A He said he'd been teaching Marxism since 1919.

Q Reverend, was there a registration procedure followed at the school?
A Yes, sir.

Q Who conducted that?
A Mr. Siskind.

Q I ask you whether or not there were any books distributed at the school.
A Yes, sir.

Q Who distributed them?
A Bob Manowitz.

* * *

(tr. 1373) * * *

Q Now, Reverend, during this school was the Negro question covered by George Siskind?

A Yes, sir; it was.

Q Now do you recall whether or not he used a book in that connection?

A Yes, sir.

Q What did he say?

A He used the Foundations of Leninism.

Q Was a policy of self-determination discussed at this school?

A Yes, sir.

Q What did Siskind say about it?

A Siskind said that self-determination was an instrument used to expose, expose imperialism and that the (tr. 1374) Communist Party, that Lenin had proved throughout the revolution of the imperialistic war, and the Russian Revolution, that the only way the national problem could be solved would be in connection with the Proletariat Revolution.

Q Now you say the national problem. Did he say whether or not there was a connection between the Negro problem and the national problem?

A Yes, sir.

Q What connection was there, as he said it?

A He said that the Negro problem was a national problem because the Negro constituted a nation.

Q Now was there a discussion of the so-called Black Belt?

A Yes, sir.

Q By Siskind?

A Yes, sir.

Q What did he say in that connection?

A He gave the geographical setting of the Black Belt, and said that it constituted seven states, two hundred and ninety counties, and that the Negro was in the majority in this given area.

Q Did he indicate why he considered the Black Belt to constitute a nation?

(tr. 1375) A Yes, he did.

Q What did he say in that connection?

A He said the Black Belt constituted a nation because of common language, common culture, economic rights, and numerical majority, and the Negro was in the numerical majority.

Q Did he say what the Communist Party would do in connection with this self-determination?

A Yes, sir; he did.

Q What did he say?

A He said that the Communist Party would lead the Negro to self-determination, and through the leadership of the Communist Party the Negro would discover that he was a nation.

Q All right. Now did he discuss the landless state of the Negro?

A Yes, sir.

Q What did he say in that connection?

A He said the capitalists had kept the Negro landless and he were powerless to make guns and ammunition to

protect himself against the revolutionary white.

Q Did he make any reference to the army of the capitalists?

A Yes, sir.

Q What did he say in that connection?

A He said that the capitalist particular army was afraid (tr. 1376) to put guns in the hands of Negroes, and he also stated that even in the last World War they were afraid to put guns into their hands, but they had to do so.

Q Reverend, you made a reference to protecting themselves against revolutionary whites. Did you mean revolutionary? Direct your attention to what you said previously, that about protecting the Negroes against revolutionary whites. I ask you whether or not you intended to use the word revolutionary. I don't know whether you understood that.

A Would you state the question again, please?

Q Well, I asked, was just directing your attention back, you said that the—

A Oh, I didn't mean revolutionary. I meant reactionary.

Q Reactionary. Thank you.

Reverend, did you have a course covering the subject matter of the people against the Trusts taught by George Siskind at this school?

A Yes, sir.

Q Did you use any books or texts in that connection?

A Yes, sir.

Q What book or text did you use?

A The textbook, The People Against the Trust.

Q Is that a book, a pamphlet by Eugene Dennis?

(tr. 1377) A Yes, sir; it is.

Q Now I ask you whether or not Siskind asked any questions in connection with this discussion?

A Yes, sir; he did.

Q Do you recall a question with respect to the method of attacking capitalism?

A Yes, sir.

Q What did he say?

A He said the way to attack capitalism was to fight for socialism, and also to take over the capitalist plant, and wipe them out.

Q Now I ask you whether or not a question was asked of Siskind at this time.

A Yes, sir; there was.

Q Who asked it?

A I did.

Q What did you ask?

A I asked him how would this be done.

Q What was his answer?

A He said it all depended upon how the capitalists wanted Communists to take over.

Q Did someone else in the class make a statement at this time?

A Yes, sir.

Q What was the statement?

(tr. 1378) A The statement was—

MR. TAYLOR: By whom, Mr. Keeney?

BY MR. KEENEY:

Q I don't think it is pertinent as to by whom, but I will ask it.

By whom?

A The statement was made by Hersho Walker.

Q What did Hersho Walker say?

A He said he didn't think the capitalists would ever give up.

Q Did Siskind make an answer to that?

A Yes, sir; he did.

Q What did he say?

A He asked him what would a Red do if you got him holed up in a corner.

Q What did—did Herschell Walker give an answer?

A He did.

Q What was his answer?

A He said that the Red would fight back.

MR. TAYLOR: Rat or Red?

THE WITNESS: Red.

BY MR. KEENEY:

Q Did Siskind say anything at that time?

A Yes, sir.

Q What did he say?

(tr. 1379) A He said that was the answer to your question.

Q Was there any discussion during this course of the

stage in which the United States is in, or was in at that time?

A Yes, sir.

Q What was the discussion by Siskind?

A It was—

Q What did he say?

A He said the imperialistic stage was the final stage of the capitalist society.

Q Did he say what the next stage would be?

A He said the next stage would be socialism.

Q Reverend, was there any discussion of certain families in the United States during this course?

A Yes, sir.

Q What was it, by Siskind?

A It was.

Q What did he say?

A Siskind said that there was sixty-two families that governed the United States, and that they lived sumptiously off the exploiting of labor, the working class, and that they was afraid to allow the working class to have a fair living, that they were afraid that they would have to come down off of the high horses on which they lived or rode.

Q Reverend, in connection with this discussion of these (tr. 1380) families, was there an illustration given by Siskind?

A Yes, sir; there was.

Q What was the illustration?

A He gave an illustration of a drove of geese flying and he said that whenever you saw a drove of geese, the had a leader, and if he wanted apprehend that drove, w

would shoot the leader down, and the rest of them would come to the ground, and you could apprehend them easily.

Q Did he say anything about strategic spots in the United States in the event of war?

A Yes, he did.

Q What did he say in that connection?

A He said if these families lived all in one spot, it would be easy to drop an atom bomb and destroy them all, but since they lived at different spots, that Russia knew the strategic spots of the country, and when they got ready to do business, they wouldn't be wasting bombs.

Q Now, Reverend, was there any discussion of the desire on the part of the working class and the Progressives for socialism?

A Yes, sir.

Q Did Siskind say something in this connection?

A Yes, sir; he said that the working class and the Progressives was ready for socialism, and that they would lay down their lives, if necessary, to obtain it.

(tr. 1381) Q And how would it be obtained, according to Siskind?

A Siskind stated that it would be obtained through bloodshed, if necessary.

* * *

(tr. 1395) * * *

Q Reverend Jones, getting back again to this Training School in 1947 in St. Louis, did there come a time during that Training School when George Siskind discussed various historical periods of society?

A Yes, sir; he did.

Q Do you recall what he said in that connection?

A He said that there was five historical societies that had been—

(tr. 1396) Q Do you recall those, and can you give them as George Siskind gave them?

A Yes, sir.

Q Would you do so, please?

A Primitive communism, slavery, feudalism, capitalism and imperial capitalism.

Q Imperial capitalism?

A Yes, sir.

Q Does he say whether or not the United States was in one of these periods or stages?

A Yes, sir; he did.

Q What stage?

A Imperialistic stage.

Q Now did he say anything about the death of these periods?

A Yes, sir.

Q What did he say in that connection?

A He said all of these societies had come to being and lived and died, and many of them had died in bloodshed, and the capitalist society might also die in bloodshed, but even fundamental it would die.

Q Did he say anything with reference to capitalism and war?

A Yes, sir; he did.

Q What did he say?

(tr. 1397) A He said capitalism needed war and in peacetimes they had cut enough throats and killed enough

people to keep the administration strong and powerful, but a new season had come and the end would come when the Communist Party would get close enough to link horns with the other revolutionary society.

Q The end would come when the Communist Party would what, sir? I didn't understand that last part.

A The end would come when the Communist Party would get close enough to link horns with other Communist members of Russia.

Q Now, Reverend Jones, was there a question asked at this time, as you recall?

A Yes, sir: there was.

Q Would you recall who asked it?

A Yes, sir; I did.

Q What did you ask?

A I asked when war would come against capitalism, would they defend themselves.

Q Did George Siskind answer your question?

A He did.

Q What was his answer?

A He said, Yes, they would definitely defend themselves, but there would be no use because there was other Communist nations that would surround the United States and (tr. 1398) come to the defense of the Communists, and the only way the United States would have out would be to break the reign of the Capitalists.

Q Reverend Jones, you referred to the book, History of the Communist Party Soviet Union being used at this Training School. In what course was this used?

A In the course of the Five Historical Periods.

Q Was it also used in a course on the History of Russia?
A On the History of Russia, too; yes, sir.

Q Did George Siskind teach this course?
A Yes, sir; he did.

Q Do you recall what he said in teaching this course?
A Yes, sir.

Q Would you tell us, please?
A. Siskind said that there had been get-together of the people in Russia in order to set up the Communist Party back about 1884 through 1898, but it had failed. The Party that they set up didn't do what they wanted done. It worked for a nickel an hour more rather than prepare the workers for revolution. And, of course, that was not the type of Party which they wanted. 1898 they made another attempt.

Q Now, Reverend, did he discuss the Communist Party in relation to the general staff of an army?
(tr. 1399) A Yes, sir; he did.

Q. What did he say in that connection?
A He said general staff of an army was different from the Communist Party or general staff of an army operated from a safe spot from behind the line, and led the army from a far distance, and that the Communist Party went forth and fought with the workers.

Q Did he say anything with reference to the techniques?
A Yes, he said that you couldn't be a good leader without knowing all of the techniques of fighting.

Q Did he say anything with respect to carrying out instructions?
A Yes, sir.

Q What did he say in that connection?

A He said that capitalists in the army did not carry out the instructions in full, but the Communists did, irregardless of what the cost would be, they would carry out instructions completely.

Q Reverend, directing your attention to the final session of the School, did George Siskind direct that final session?

A Yes, sir; he did.

Q Would you tell the jury what he did on that occasion?

(tr. 1400) A The final session of the School, Siskind gave a final summary of the work that had been done that week, and allowed each student to say what he wanted to say about the work, and then he said that we had made great accomplishments, and that we must all start out from that day on to put them in practice.

Q To what, put what into practice, Reverend?

A What we had been taught in the Communist Party School.

Q On this, at the occasion of the last session, did you have a personal interview with George Siskind?

A Yes, sir.

Q Would you describe what happened at that time?

A I talked to him and he autographed a personal notebook of mine.

Q This personal notebook, is that merely a notebook where you kept names of and addresses of friends?

A Yes, sir; it was.

Q And so forth.

What else happened?

A And he told me he was going to New York and out

of New York about fifteen miles, he would conduct another Communist Party School.

Q Did he say how long this School would last?

A Until July.

(tr. 1401) Q And did he indicate where he was going then?

A He would go from there to California and conduct another Communist Party School. Said he would be glad if I would correspond with him and he would be glad to send me any material of which I should like to have.

Q Reverend, did anything else take place at this final session?

A Yes, sir.

Q What took place?

A At the final session we was given a pledge by Mr. Siskind.

Q Now you say you were given a pledge. What do you mean by that, Reverend? Can you describe that?

A Well, I mean that he said that we all must take a pledge.

Q First of all, will you tell us what the, how did he give the pledge to you?

A He worded it out, and we, as students, repeated the pledge after him.

Q And did each and every student recite the pledge?

A Yes, sir.

Q What was the pledge as given by Siskind and as given by the students?

A. The pledge was each of us are Communists or members of the Party and each of us have a responsibilit

(tr. 1402) and we must carry out our responsibility and work for the interests of the Party and its recipients and carry out the full will of the Party even though it meant to fight and to kill, we must carry out the demands of the Party and all of them.

* * *

## TESTIMONY OF BELLARMINO J. DURAN

### DIRECT EXAMINATION

(tr. 1421) * * *

Q Is your name Bellarmino Duran?
A Yes, sir; it is.

* * *

Q Where were you born, Mr. Duran?
A I was born in Dulce, New Mexico.

Q Dulce, spelled D-u-l-c-e?
A Yes; it is.

Q Where do you live now?
A In Denver, Colorado.

Q By the way, what is the date of your birth?
A December the 10th, 1923.

(tr. 1422) Q While you were a child was Spanish spoken in your home?
A Yes, sir.

Q Where did you live during the early years of your life; just give us the states.
A Colorado, Wyoming, Idaho.

Q How many years did you go through school, Mr. Duran?

A Seven.

Q Now directing your attention to the month of March in the year 1951, did you at that time attend a special school?

A Yes, sir; I did.

Q Where was it?

A In Bonnie Beach Place, in City Terrace Drive, Los Angeles, California.

Q What was the name of this school?

A National School for Mexican Cadres.

Q What organization established this school?

A The National Education Committee of the Communist Party U.S.A.

Q Was this a school that was solely for members of the Communist Party, Mr. Duran?

A Selected cadre, with a cadres that were highly trusted and people that had been ideologically developed as well as politically.

Q I see. At this time were you a member of the Com-
(tr. 1423) munnist Party?

A Yes, sir; I was.

* * *

(tr. 1425) * * *

Q Mr. Duran, who were the persons who were in charge of this school that you attended in Los Angeles in March, 1951?

A Art Berry, District Organizer from District of
(tr. 1426) Montana, Idaho, Colorado, Utah, New Mexico, Arizona, and Texas, and Professor Alberto Morean,

M-o-r-e-a-u, from the Jefferson School in New York City.

Q When was the first session of this school?

A The first session at that school in Los Angeles was held Monday, March the 7th, 1951.

Q How many persons were present?

A Nineteen.

Q How many of these nineteen were students?

A Seventeen.

Q Who were the other two persons, who were present?

A More than the seventeen?

Q No, who were the other two persons besides the students, of the seventeen persons who were present?

A The ideological teacher, Alberto Moreau, and the political teacher, Art Berry.

Q Did all these students in this school speak Spanish, Mr. Duran?

A Yes.

Q Could Professor Moreau speak Spanish; do you know?

A I'd say sufficiently to have conversation, but not to conduct an ideological school.

Q How about Mr. Berry?

A No, sir; other than two or three words, and that is it.

Q Was the teaching in this school in Spanish or in (tr. 1427) English?

A Both. At the beginning it was in Spanish, and it became necessary to change it into English language.

Q Mr. Duran, directing your attention to the opening

session of this school on March 7, 1951, did Mr. Berry at the time of the first meeting make a talk; do you recall?

A Yes, sir.

Q What did he say?

A At the orientation of the school Art Berry stated to the class that this was the National School for Mexican Cadres, to study theory of Marx and Lenin and in relationship to the liberation of the Negro people, the Puerto Rican people, and the Mexican people, of the Southwest, U.S.A.

Q Did he say anything about establishing a commission at that school?

A Yes, sir.

Q What did he say?

A Well, in this orientation he went into the necessity of establishing a School Commission to control the policy of the school, and also to handle any grievances that may arise, he proposed the division of the school into three groups with study club captains as their heads and also one librarian and one secretary to the school, and Professor Alberto Moreau, himself, as part of the Commission to the school.

(tr. 1428) Q Do you recall whether or not you were named a member of this Commission, Mr. Duran?

A I do.

Q Were you named a member of this Commission?

A Yes, sir.

Q What were your responsibilities?

A I was made a study club captain and my responsibility in the school was to help handle policy of the school

and also teach in my study club, the members, whatever lessons they were assigned by the professor or Art Berry.

Q How many study clubs were organized at this school?
A Three.

Q Do you recall whether or not Berry introduced Alberto Moreau to the students?
A Yes, sir; I do.

Q What did he say at the time?
A He introduced Alberto Moreau as a member of the National Education Commission of the Communist Party, and also as a man who was very capable throughout the years of teaching the science of Marx and Lenin and also the person that had taught him, Art Berry, what he knew about Marxism-Leninism.

Q Now after this introduction, Mr. Duran, did Mr. Moreau make a talk?
A Yes, sir.

(tr. 1429) Q What did he talk about?
A He talked about the monopoly of capitalism, stating that as the capitalism became more decadent, it matured into the imperialistic stages, into imperialism. He outlined the necessity of teaching the masses, the people, the desirability of changing the system and in so doing, we had to teach the people that it could only be done successfully through the Proletarian Revolution.

He divided in his explanation the Proletarian, Proletariat—excuse me, as being divided into two groups. Those in industry that would lead the revolution, and those in agriculture that would follow, and speaking about the revolution, Professor Moreau stated to the class in a very emotional manner that he could see himself carry-

ing a gun against the capitalist S.O.B.'s, and explained to the class it was all based on the science of Marx and Lenin.

Q Now, Mr. Duran, did you have a notebook with you while you were at this school?

A Yes, sir; I did.

* * *

(tr. 1431) * * *

Q Mr. Duran, your notebook has now been marked as Government's Exhibit for identification No. 75, and I now hand it to you. What was the first thing that Professor Moreau said about the qualification of a cadre, Mr. Duran?

A I'd like to make reference to my notes.

Q Surely.

A He started out with asking us, the class, a question, which are the qualifications of a cadre and why. One, working class; the Party teaches us that the Bolsheviks must be conscious of the experiences of the working class as well as the existing conditions in every and have direct contact with the workers on all forms, but specifically with the Proletariat.

Q Mr. Duran, with regard to this reference to Bolsheviks—

A Yes, sir.

(tr. 1432) Q What was Mr. Duran's teaching in this school with respect to Bolsheviks?

A You mean Mr. Moreau, sir?

Q Professor Moreau, yes.

A Well, the teachings of Professor Moreau in rela-

tionship to Bolsheviks and what it meant in this. First, the Communist enters the Communist Party and he is tested by practice whether he is a sincere member or not. Then during trials and tribulations of that cadre in the Communist Party, if he does not betray the Communist Party, goes through the jail, goes the courts and everything that the Bourgeoisie can throw at him, then and only then is he a Bolshevik, a Soviet in true sense of the word.

Q Was anything said in this school as regards training the students to be Bolsheviks?

A Yes, sir.

Q What was said in that respect?

A The entire school was, according to the statements of Professor Alberto Moreau, to train the special selected cadre in this school to be Bolsheviks. That is what he expected out of us, and that is the way he was going to teach us, and if we made mistakes, he was going to crack down on us as Bolsheviks.

Q Mr. Duran, will you refer once again to your notes and tell us what the next statement was of Professor Moreau?

(tr. 1433) A Yes, sir. The victory of the Proletarian Revolution and victory of establishing a dictatorship of the Proletariat is impossible without a revolutionary Party of the Proletariat, free from opportunism, and indefinitely free from misleaders first qualifications he must be a worker and also class conscious in and by no means an opportunist.

Q Now, Mr. Moreau—correction—excuse me, Mr. Duran. Mr. Duran, how did Mr. Moreau discuss this Proletarian Revolution? What did he say it was to be?

A In discussing the Proletarian Revolution more thor-

oughly Professor Moreau explained throughout the schoo
that the Proletarian Revolution would only come abou
if a Bolshevik rank and file, the sincere Communists
would get out and teach, and teach the people, the de
sirability of changing the system and the necessity o
changing them, and in doing that, we had to teach th
people that you cannot change the capitalist system to a
Socialist system, to socialism successfully, the peacefu
way; it had be erupted from, and had to be taken awa
by force and violence, away from them and the entire
state machinery of the Bourgeoisie smashed, the F.B.I.
the courts, and the Army and the Navy, whatever was
on it, what—the entire instrumentality of the Bourgeoisie
had to be smashed and substituted by the Proletarian
machinery.

It meant achievement could only come by the Com-
(tr. 1434) munists going out and teaching the people
that the capitalist system was rotten to the core. It could
no longer serve the way the people, the way it should,
and show them all the benefits—excuse me—and show
the people all the benefits that there was, in socialism for
them, and during the period of the revolution the transi-
tion, the violent transition, we had to make mass work
to get the masses away from the Bourgeoisie so they
would not join a counterrevolution movement.

It meant after the people of the Communist Party, the
vanguard, had become satisfied, that the Bourgeoisie ma-
chinery was smashed, and they were in control, then
they also had to collect guns from the people and control
the people themselves.

Q Do I understand, Mr. Moreau, that during the
period of revolution the people, that is, the masses of the

people, would be carrying guns?

A Yes, sir.

Q And after the revolution do I understand that the Party would go around and collect these guns and take them away from the people?

A Yes, sir; take them away from those that helped them overthrow the capitalist system in order to assure the revolution itself—that is where I missed a point there—not, I am not referring to my notes.

Immediately after the overthrow of the capitalist sys-
(tr. 1435) tem and establishment of the dictatorship of the Proletariat, it became necessary for a Communist to establish Red Army in this country, not only to secure and maintain the dictatorship of the Proletariat, but control the people as well, and those people that did help overthrow the Government would not have any civil rights whatsoever, no voting rights, or anything: they would be dished out to them according to the way they felt, way they fell in with the Communist office by the dictatorship.

Q Now, Mr. Duran, what, if anything, did Mr. Moreau teach you in this school about the role that would be played by the Communist Party during this period of revolution when the Government would be overthrow by force and violence?

A The role of the Communist Party, and specifically within the Communist Party, the Bolsheviks was to play a vanguard role, a leading role; that is explained scientifically in that so that first we teach the people the desirability of overthrowing them and teach them the, it could only be done through the Proletarian Revolution, and then when the time is ripe we could stampede them against the capitalist class.

Q Mr. Moreau—Mr. Duran—excuse me. I am very sorry.

A Apology is accepted.

Q Was there any teaching by Mr. Moreau regarding (tr. 1436) Marxism-Leninism as a guide to action?

A Yes, sir.

Q What were you taught in that respect in this school, Mr. Duran?

A I'd like to make, again, reference to my notes, if you please, may do that.

Q Surely.

A Under the explanation of the qualifications of a cadre, a dictation of Professor Moreau at the school points out the answer to your question now. The point of knowing theory does not mean we can memorize all the formulations of Marx, nor that we use Marx, Marxism as a blueprint, nor does it mean by no chance that it is a dogma, but it is a guidance for action, the one that gives the working class an open door, an opportunity to self-improvement, the workers as a whole.

We comrades must learn how to solve problems.

Do you want me to continue or does that answer your question?

Q That, I believe, answers the question, Mr. Duran

A Yes, sir.

Q Was there anything said to you about taking back to other people the teachings that you had received at this school?

A Yes, sir.

Q What were you taught in that respect?

(tr. 1437) A Well, the entire teachings, the entire scientific teachings of Marx and Lenin in that school was supposed to be taken back and employed at different levels on the organization.

However, there was a special request that the qualifications of a cadre be specifically explained to all, in our Communist Party groups, committees, or whatever form of organization we were participating in.

* * *

(tr. 1443) THE COURT: Let the jury withdraw.

* * *

(tr. 1453) * * *

THE COURT: All right. So much for that.

Now taking up for a minute this whole subject to production and protection under Section 3500, I do not know that we have been following the provision in the statute, but sealing up the portions that you have not divulged, and making that available to the Court of Appeals in the record if—

MR. KEENEY: As I understand, we have come to an agreement, Your Honor, on all of it, all that's been produced so far; so there is no requirement under the statute.

MR. TAYLOR: I guess technically that is not true on Lautner. I think the Court reviewed everything there and we never made any showing or argued. I don't think it occurred to me until this moment what we had done about Lautner. It is true that on Mrs. Hartle I think we agreed, seems to me that you had one paragraph that you wanted out and I said that was O.K. with me, and that is the way it went.

MR. SMITH: I seem also to recall that next, I believe next one, Lautner, you made the statement on the record that we would follow this procedure without waiving any rights to contend that the Section 3500 didn't comply with the constitutional requirement of due processes.

MR. TAYLOR: Hadn't come up on Clontz.

MR. KEENEY: You mean I said it?

(tr. 1454) MR. SMITH: Mr. Taylor said it. We had an operating agreement, but without waiving the right to contend at some later time that Section 3500 itself did not satisfy the constitutional—

MR. TAYLOR: That is the constitutional point, yes.

MR. GAVIN: That was my understanding.

THE COURT: But that was over and above everything else.

MR. TAYLOR: On Clontz, of course, we haven't finished looking at the reports yet, and if I recall rightly, there are some fairly extensive clippings, in some of those documents. So I would suppose to be, say, workmanlike, to put them in an envelope and seal them up for appellate purposes, if need be. Is that arduous? I hope not.

MR. KEENEY: Starting with Clontz?

MR. TAYLOR: Well, let's see, I guess Lautner. I guess Lautner.

MR. WOERHEIDE: We will actually—it's a little bit premature, I think on Clontz because technically speaking he has not been discharged as a witness. He is still on the stand and still subject to cross-examination.

MR. TAYLOR: Yes.

MR. WOERHEIDE: And there are still reports that we are attempting to procure to comply with your request that we haven't yet obtained.

(tr. 1455) THE COURT: Well, just bear that in mind. We ought at the end of the case either have a stipulation covering it, or we ought to perform in accordance with the statute.

MR. KEENEY: I would like to be clear on Lautner. I am afraid we have started to distribute those back to the field offices. If they are to be sealed, we would like to be—

MR. TAYLOR: I suppose if something is going to be sealed, we might as well seal it all. Wouldn't that be the best thing to do? Of course, we have, I hope we don't have to do anything more about it.

MR. KEENEY: I don't think you took any exception to the decision of the Court.

MR. TAYLOR: I don't believe I have, but we have not gone beyond the point where we theoretically could, if we wanted to.

MR. KEENEY: I am not going to raise a technical objection, but the record, I think, shows that you didn't press upon the Court the fact that you might want additional material that is being excised. I don't think it would be quite fair at this point.

MR. TAYLOR: It really doesn't matter. I don't care one way or the other about Lautner, if you want to move him out of that. That's O.K. with me, and the same goes with Mrs. Hartle because, if I understand

rightly, what he told me, the only thing that was taken out of Mrs. Hartle's reports, were the identifying numbers, and the one paragraph that you showed me be-
(tr. 1456) fore.

MR. WOERHEIDE: There was a paragraph—just for the record, to make it absolutely clear, that did not relate in any way to her past activities as a member of the Communist Party.

MR. TAYLOR: Well, that is the paragraph that you didn't show me and that we said we would not insist on being reviewed.

So we can rule out those two and seal up the subsequent witnesses, I mean, their remarks.

* * *

## CROSS-EXAMINATION OF BELLARMINO DURAN BY MR. TAYLOR

(tr, 1460) * * *

Q Have you ever heard Art Berry teach what the task of the Mexican cadre should be in the Communist Party?

A Yes, sir.

Q Tell us what he said about it.

A Making reference to the different schools that Art Berry taught in or specifically in Los Angeles School?

Q Will you tell us specifically what you heard him say and what he said?

A In the Estes Park Communist Party School, Estes Park, Colorado, and at the Jefferson Communist Party School, at Evergreen, Colorado, Art Berry taught that the Communist cadre in the Communist Party had the

responsibility—

Q Did you say Mexican cadre or Communist?
A Mexican cadre.

(tr. 1461) Q Mexican cadre. Excuse me.
A Had the responsibility of leading the people and teaching them the desirability of changing the system, and also in doing so, that it had been, had to be done through the Proletarian Revolution. He taught the cadres had to be steeled, had to raise their culture, had to get to the level of Bolsheviks, and those teachings he taught to the cadres there, that the level in achievement and culture that—I am not reading from this—that the level in teaching, that in achievements, that Lenin, Engels, Stalin and the rest had achieved could also be achieved by the Mexican cadres.

This was not impossible. They were not superhumans, and we definitely could do it through the process of day-to-day struggle in the development of the science of Marx and Lenin.

Q Now at this Estes Park School, did he also teach you that it was the task of the Mexican cadres to work for peace and peaceful settlement in Korea through the medium of newspapers and churches?
A Yes, sir.

Q He did?
A Yes, sir.

* * *

(tr. 1463) * * *
Q My question is this. While you were a member of the Communist Party and holding these positions, what

activities did you engage in in behalf of the Communist Party? What did you do?

A I'd like to use some of my notes on that, if you will allow it.

Q Well, I am perfectly willing to allow, but I want to be sure you understand the question.

A I do.

Q I am not asking you where you were, or what your responsibilities were. I wanted to know what you actually did by categories?

A By categories in the Communist Party—principally, I was Educational Director in the Mexican West Side Branch of Denver, Colorado. My discharge of duties there were to teach the membership how, to teach the (tr. 1464) people the desirability of changing the system and also that it could only be done successfully through the Proletarian Revolution.

Q All right. You taught—

A And—

Q Go ahead.

A Pardon me?

Q Go ahead.

A In the State Chairman of the Mexican Commission my responsibility was to develop the science of Marx and Lenin in all the different stratifications of work within the Mexican field work.

As Chairman of the group it was my responsibility to see that that science was applied to the work.

As a Group Captain it was to get the people working, actually putting the theory into practice, and to teach the people that theory without practice, or practice without

theory was absolutely nothing, in the activities of the National Association of Mexican Americans, that is, the English translation of Associacion Nationale, Mexico-American.

Q That's what you call the A.N.M.A.?

A A.N.M.A.; yes, sir. In this course that was created by the Party to my knowledge I participated with instructions from the Communist Party in the United States Department of Agriculture hearings at Greeley, Colorado, (tr. 1465) in reference to price and wages, and the Denver City Council as a representative of A.N.M.A. on subject Rents, Controls, on the Peace Drive, within the organization, Civil Rights.

Q I am sorry. I didn't get that—Peace Drive—what?

A Within the organization.

Q Hmn.

A Alone. In other words, civil rights within the organization, first-class citizenship within the organization, A.N.M.A. relief struggles within A.N.M.A., Gracia case. And there we had a big picket line that we were able to organize because the people listened, and we picketed the governor and just plain raised the devil around his house. The Matthew Martinez case in Greeley, Colorado. And the Progressive Party our responsibility there was to teach the people that the Democratic Party and the Republican Party were in reality one and the same instrument of the Bourgeoisie. Therefore, the Progressive Party was the only party that spoke for the people because it was the Progressive in the true sense of the word, Progressive. It was not based on the Bourgeois ideology. On deportation cases Martinez, in Chicago, labor leader, another—and other deportation cases, and also

in the Communist Party I was assigned to be—

Q I am sorry. What were you going to do about those deportation cases?

(tr. 1466) A To fight to stop deportations.

Q Right.

A And also within deportations, the Communist Party assigned me to learn all the angles in the revolutionary fashion to defend the Parties in the Court and they would see to it that I got the permission in the Court to do so. Under police brutalities, all the forms and kinds throughout the state, and the city, as well as nationally, in Denver, Colorado.

Q Excuse me. What were you going to do about police brutality, oppose it?

A To fight police brutality in the Communist Party.

Q Yes.

A Was the vehicle by which we could set the people against the local government.

Q Go ahead.

A In Denver, Colorado, on a police brutality case named Ray Martinez, the Communist Party group that I was in was able to sue the patrolman for forty-five thousand dollars and the organization was named the West Side Fair Play Committee. And the United States Senate hearing in Denver, Colorado, on the juvenile delinquency, was on that hearing we picked it up, and we proved the United States—

Q By "we" you mean the Communist Party, I take it?

A Literally; yes.

Q Go ahead.

(tr. 1467) A We picked up the issue in proving that a lot more had to be done than that. It was not the youth of America who were to blame. It was the entire capitalists

system that was rotten, and the Senate hearing did absolutely nothing, no good whatsoever. And, therefore, organizations of the peoples were the ones to do it, and within that we taught that the United States Senate was only an instrument of capitalism and did not serve the people.

On high prices an organization was created called the Guardian Angels, housewife, to fight, higher prices, as a vehicle to contact the people and teach them the desirability of changing the system. In so doing they could only be done by the Proletarian Revolution.

Housing, to clear the slums, to bring the Federal housing under a more minimum rent.

On discrimination—

Q You mean to keep it under minimum rent control?
A Yes, sir.

On discrimination, every angle under discrimination was used. For example, on the police brutalities activities, on deportation cases, and the ones I have named before, when minority groups were involved, we were to teach them that they were, they did not have a place in the capitalist society. There was no room for them in capitalism and they had to understand that. And they had to agree to help to over-
(tr. 1468) throw the Government. And in penetration of churches, we penetrated churches and developed the peace drive, peace in Korea, the penetration, of course, of assigned organizations by the Communist Party.

Q Suppose you just tell the jury what you mean by "penetration"?

A By penetration I mean the, those organizations that were Bourgeois in conception that they did work for the people but did not do any revolutionary work.

Q I mean—

A That would help the Proletarian—

MR. WOERHEIDE: Your Honor, I submit the witness is trying to answer the question and trying to do so—

MR. TAYLOR: I don't think he understood the question.

THE WITNESS: I most certainly do understand the question.

BY MR. TAYLOR:

Q I want to know what you mean by penetrating the churches. What do you mean by this was, this process—

A That's exactly what I am trying to explain, sir.

Q Go ahead.

A Well, penetration was the, those organizations that did not do revolutionary work, that would benefit the Pro-
(tr 1469) letarian Revolution. We had to actually penetrate, get inside of, get inside of them and develop revolutionary work that would actually help the Proletarian Revolution.

Does that answer your question?

Q You mean to get members into the organization?

A No, that would be absolutely a Bourgeois conception of penetration to get members inside. That would be a mechanical operation to get members inside. They would do the revolutionary's work, that is penetration in the Communist sense of the word.

Q You mean members of the Communist Party?

A Yes, sir.

Q Right. Go ahead.

A Penetration of the Democratic Party, and the realignment of the forces in there, and the final destruction of the Party. The elections of 1952, and there speak to Senators, speak to Congressmen, city council, whoever was running, offer them a certain amount of support if they would compromise their program with what we would be assigned to take to them.

On the Civil Rights Congress, Denver, Colorado, the picket lines on a U. S. Court in Denver during the Smith Act trials, and within that our biggest slogan there was calling the Federal judges a Fascist, and an S.O.B., and picket line against the U. S. Attorney General McGrath, (tr. 1470) and we had a very, very big picket line in the front of the schoolhouse. We blocked his entrance and he continued in there with the help of the local authorities. And afterwards, when he succeeded doing that, we went in and scattered throughout the people. And when he started talking, we started making noise and under instructions, we left, and some of the people with us. We actually went in and told the people, "Let's go." And in Congress, Party trials, to go in there and whenever any witness made a mistake or such, just make a good big laughter and turn the whole matter into a joking thing.

And that's some of the activities that I was able to enumerate to you. But I would say this, that they are very little compared to actually what we were doing.

Q You mean you could make a much longer list if you had time?

A If I had sufficient time I presume I could; yes.

Q Would you tell us what those notes were you were

reading from and where you got them?

A The notes that I read from here I prepared approximately fifteen, twenty minutes before I took the stand.

## REDIRECT EXAMINATION OF DURAN

By Mr. Woerheide:

(tr. 1506). * * *

Q Mr. Duran, you were asked on cross-examination regarding your attendance in certain schools and you referred to a school held at Estes Park, Colorado. Do you recall the dates when that school was held?

A Yes, sir.

Q What were the approximate dates?

A The dates were in the, at the Estes Park School, was approximately September, 1952.

Q How long did this school last?

A Two weeks.

Q Who was in charge of the school?

A Art Berry and Anna Berry.

Q Who was Art Berry at that time?

A At that time he was District Organizer for the seven states that I named and National Chairman of the Mexican Commission, and according to his own admittance also an Underground, to the second string Underground Communist leaders.

Q Did the school that was held in Estes Park, Colorado have a name?

A Yes, sir.

Q What was it called?

(tr. 1507) A It was called Estes Park Communist Party School.

Q What was the level of that school? Was it a state level or a section level?

A It was on a state level.

Q Do you recall approximately how many students attended that school?

A Approximately, I don't. However, I could name the names of the individuals which may give you a definite figure.

Q Well, that is not necessary. Was it more than ten?

A Yes, sir.

Q Was it more than twenty?

A No, sir.

Q Somewhere between ten and twenty persons, then?

A Yes, sir.

Q Now the school that you attended at Evergreen, Colorado, can you give us the dates when that school was held?

A Yes, sir; but I think I made a mistake on the places. Estes Park, I got them mixed up in my mind a little bit. Estes Park was on, from June 16 to July 3rd, 1951, and the one at Evergreen, Colorado, was in September 1952.

Q Now I gather from your present recollection that the Estes Park School lasted for about two weeks; is that correct?

A Yes, sir.

(tr. 1508) Q How long did the Evergreen School last?

A Two weeks.

Q Who was in charge of the Evergreen School?

A The Evergreen School was Art Berry and Anna

Berry, and the Estes Park School was just Art Berry.

Q I see. Now was there any change in the positions and the responsibilities held by Art Berry in the Communist Party between June 16 and July 3rd, 1951, when the Estes Park School was held and September, 1952, when the Evergreen School was held?

A In the positions; no, sir, other than in '52 he was more active than the first school. In the first school he was more underground.

Q I see.

Now at the time of both of those schools did you, yourself, hold positions on a state level in the Party?

A Yes, sir; I did, both of them.

Q Were both of these schools schools for leaders on the state level in the Party?

A Not exclusively, no. It was the leaders plus selected cadre.

Q Do you recall approximately how many people attended the Evergreen School?

A Not specifically; no, sir.

Q Can you approximate the figure?

(tr. 1509) A I would approximate it at between ten and twenty.

Q Mr. Duran, in your testimony on cross-examination you did mention some of the teaching that you received at these two schools, and I ask you if you recall that during the course of this teaching there was used as an illustration a kettle of water?

A Yes, sir; I do recall it.

Q Do you recall at which school that illustration was used?

A Yes, sir; I do.

Q Which one was it?
A It was the Estes Park School at Estes Park, Colorado.

Q Was this teaching by Art Berry?
A Yes, sir; it was.

Q What did he say with respect to a kettle of water?
A In respect to the kettle of water, we were discussing the scientific application of Marx and Lenin to the transition period between capitalism and socialism, and he demonstrated this with the kettle of water, that you could put a quantitative amount of water in a kettle and set it somewhere, nothing would happen, just like the masses, nothing does happen.

Usually he used the example of a quantitative amount of water in relationship to the people, said, however, if (tr. 1510) you get that same amount, same kettle with the same amount of water in it, and put fire underneath it, then you begin to get quantitative changes, and eventually it reaches a nodule point to where it has a qualitative and abrupt transition into steam. He continued. same applied to the development of the revolution in this sense, the American people will not and cannot make a successful change over from capitalism to socialism by themselves, like the fire underneath the water, the Communist Party teaches and leads them to where when the society reaches that nodule point, the Communist people teaches the people before and then leads them to make that abrupt change into the society of socialism.

He explains there very thoroughly the laws of metaphysics and the laws of dialectical materialism, the Bourgeoisie, complained Art Berry, had the conception in metaphysics that quantitative changes alone would bring about

a qualitative change, and he uses the same theory that Kautsky was fighting Engels on and also the way Lenin defended Engels against Kautsky's theories of withering away the state.

He claimed that the law of metaphysics is an entirely, a Bourgeois conception of things, of a peaceful transition, and so on, told us that we were not based on the law of metaphysics. We were based on the law of materialism. (tr. 1511) dialectical materialism, which was the law of developing society, the way the present society was a midwife to the old society, impregnant with revolution; showed us that our role was that like the fire, to lead the masses after we had taught them the desirability of changing the system through the Proletarian Revolution, to lead them, and bring about abrupt change of capitalism into socialism.

In conclusion, to the best of my recollection, he again stressed to the class to learn the difference between the law of metaphysics and dialectical materialism and historical materialism which would give us the answer, and he stressed if we do get in difficulties to look into the books of theory.

Q Mr. Duran, do you recall that in one of these schools there was a reference by the instructor to a visit made by an American Communist woman to China during the violent revolution which took place in China?

A Yes, sir, I do.

Q At which school was this?

A At the Evergreen School at Evergreen, Colorado.

Q Who was the instructor who referred to this incident?

A Art Berry.

Q What did he tell you?

A He told us in relationship to answering the question (tr. 1512) that I put to him at the school, was it to be a peaceful transition or we to fight a Proletarian Revolution, and he answered by using a demonstration that a National Officer of the Communist Party U.S.A. had went twice to China. The first time she went there, to discuss theoretically and to aid the revolution, she had met with the revolutionaries, National Revolutionary Commission or Committee of the Communist people, and she came back there with certain decisions made.

He did not state what those decisions were. The second time when she went back, there was only one present of the former meeting she had had, and she asked for different comrades that she had met at the first meeting, and they told them that they had all made a mistake, was a wrong decision, and they were all dead because of that wrong decision, and Art Berry stated to us that is exactly how serious of decisions we Communists in the United States would have to make; we would have to learn to make the correct decisions in relation to our tactical leadership as well as strategical leadership.

Q At this school was there any reference to barricades, as you recall?

A Yes, sir.

Q What was that reference?

A Substantially, within the same explanation of violent (tr. 1513) overthrow of the Government or peaceful, he stated that not only would it be that, but that we would have to set up barricades, establish a central point from where we would participate from; he stated the "we"

literally speaking "we", would have to have a central point because during the revolution it may become necessary to ebb, retreat in certain battles, and we would have to learn to retreat in an organizational way and a correct way. It was essential to learn to ebb as it was to flow on the revolution.

In the ebbing we were to see that we ebb before the enemy wiped everybody out. Ebbing to the central point that had been barricaded, reorganization, and them at the correct time start flowing forward in the revolution.

* * *

## TESTIMONY OF CHARLES BENSON CHILDS

### DIRECT EXAMINATION

(tr. 1543) * * *

BY MR. GAVIN:

Q Your name is Charles Benson Childs?

A Yes, sir.

* * *

(tr. 1557) * * *

Q Uh-huh. Now you know the defendant, Junius Scales,
(tr. 1558) do you not?

A Yes, sir.

Q Can you identify him?

A Yes, sir. Scales is the gentleman in the second row there from the front, wearing the glasses.

Q Directly behind Mr. Smith?

A Yes, sir.

Q Now was there anything said out there at Scales'

home on that night, and that was December 17th, I believe, 1949; was there anything said relative to your joining the Communist Party?

A Well, as to my membership in the Communist Party, Robertson was the one who brought it up. He told Scales that I wanted to join the Communist Party. I believe he used the term them or Communist Party, and Scales said that that was fine.

And he talked with me a little about what I was doing, and Scales said that he'd have some people to work with me there in High Point. I think he said that the Party would soon organize, the Progressive Party in High Point.

* * *

(tr. 1560) * * *

(tr. 1560) Q Now did they have a Labor Youth meeting there that night?

A Yes, sir.

Q What is the Labor Youth? What is the Labor Youth League? Is that the name of the organization?

A Yes, sir.

Q What is that, Mr. Childs?

A It was explained to me by Friestadt, Gladys Scales and Junius Scales that the substance of these explanations were that the Labor Youth League is the youth arm of the Communist Party, and that it replaced the Young Communist League.

Q Well, now did you become active in the Labor Youth League?

A Yes, sir.

Q State whether or not you attended the first State Convention of that organization in 1950.

A I did attend the first State Convention of the Lab Youth League in 1950, in Durham.

Q Do you know whether or not that was about Augu 13th?

A It was in the summer, I recall.

(tr. 1561) Q Was Junius Scales present at that co vention?

A He was present, sir.

Q Who else was there?

A Among those persons, I don't recall all of the names, there was Gladys Scales, myself, several peopl from Winston-Salem. There was Nate Bond, there was— well, I think there were about twenty or thirty people.

Q Well, now who gave the address of welcome at tha convention, Mr. Childs?

A There were several speeches made, one by Nate Bond and one by Junius Scales, gave the speech of welcome, an he welcomed the Labor Youth League as his being th Chairman of the North and South Carolina Districts o the Communist Party.

Q State whether or not he said anything about th Communist Party and the Labor Youth League bein brothers and having the same goal or aims.

A He did say in the course of his speech that the Lab Youth League and the Communist Party were brother that they had the same aim which is the establishment socialism.

Q Do you know what his talk concerned, mainly?

A Mainly it concerned the peace campaigns, and Korean War, the possibility—he covered other things

Q Did he say anything about the Communist Pa

(tr. 1562) having allies in China and Russia and in the Eastern Europe countries?

A Well, when he spoke of the peace campaign, he mentioned that we had millions of allies in the, in Russia, in China, and he used the term "the Eastern Democracies".

Q Well, was there any discussion by the defendant on the suppression of speech in this country and, if so, what was that discussion?

A Well, he mentioned the Dennis case. I recall it being the Dennis case, that these people are being suppressed and denied their rights of free speech, and suggested that we send a telegram to Eugene Dennis, I think it was his, on his birthday.

Q When you said that he had discussed the Korean War, Mr. Childs, what did he say about the Korean War?

A He said that the Korean War was a method of suppressing the people in Korea and also the Negro people in the United States and all the workers in the United States.

* * *

(tr. 1563) * * *

(tr. 1563) Q Now did Nate Bond speak that night at the convention?

A Nate Bond also gave a speech; yes, sir.

Q What did he talk about?

A He talked about the, about the situation in North Carolina and the, he mentioned the Korean War, and that was the general theme of his speech.

Q Do you recall whether or not he talked about the Black Belt or the Negro Nation, Mr. Childs?

A Well, in his discussion about the Negro people, he

mentioned that in the Black Belt, mentioning a certain geographical location, that the Negro people in that area constitute a nation, and here he used Stalin's definition of a nation, and he said that under capitalism this nation does not have the rights to secede their independence, but under socialism it would.

Q Now, Junius Scales was present at this meeting, was he not?

A He was, sir.

Q Did his wife make a speech there on building up the Labor Youth League?

(tr. 1564) A She also made a speech; yes, sir.

Q How did she say that could be accomplished?

A Well, I recall that what we were to do would be to talk with young people, give them literature, and try to recruit them into membership in the Labor Youth League.

* * *

(tr. 1572) * * *

BY MR. GAVIN:

Q Mr. Childs, just before the recess I had asked you (tr. 1573) about your meeting with the defendant, Scales, in the late summer of 1950 in Winston-Salem when you again discussed your draft status and the probability that you would have to go into the Army. I believe you stated that you met with him in front of a church over there and discussed this; is that correct?

A Yes, sir. What happened was I saw him in the bus station in Winston-Salem, and he was using the telephone, and I waited until after he had finished using the telephone, and I went and saw him and we went into one exit there in the bus station and he told me that he was

going down in front of the church which is right near the bus station, and asked that I follow him in a few minutes to be sure that he was not being followed, and I did that, and went down there and told him that there was a prospect of my being drafted, and I discussed it with him.

He told me that I should try to fail the examination. He said that the way I could do that—well, before that he told me that if a third person was present, that he would not tell me what he was about to tell me because he could be tried for sedition and convicted, although in court he would deny ever having said these things.

What he told me was that I could, in failing the mental examination, I could tell them that I was tired, or that I didn't like the person giving the examination, and in that, (tr. 1574) generally those were specific things which I could do. I think there was another thing. And he told me that even if I were drafted, that I could still use what I had learned in the Army and possibly recruit people, but I'd have to be very careful because the Army had stool pigeons everywhere in the Army.

* * *

(tr. 1577) * * *

Q All right, sir. Now did you and the defendant, Scales, discuss at that time the Stockholm Peace Petition?

A Yes, sir.

At that time they were working on the Stockholm Peace Petition and I asked him if it would be correct or all right for us to make some distinguishing mark on the peace petition of those people we discussed, with whom we discussed the petition as we were trying to get them to sign it and he told us that, I recall my mention that maybe

we could put an "X" beside the name, and he said that that is what we must do, that we must go back and visit these people, and, because that is the only way we will be able to build ourselves.

Q Mr. Childs, do you know what the Daniels Defense Committee was?

A Yes, sir.

Q What was that?

A The Daniels Defense Committee was organized to try to defend the Negro young boys somewhere near the Coast, who were charged with murder.

(tr. 1578) Q Uh-huhm. Now did you have a discussion with the defendant, Scales, about the Daniels Defense Committee at this meeting in High Point on June the 26th, 1950?

A I discussed with Scales at this meeting the Daniels Defense Committee and he told me that the N.A.A.C.P. is trying to run the Daniels Defense Committee case because the N.A.A.C.P. wanted the Daniels case to be a pure court case, whereas, that should not be done.

What should be done is that these cases should be used to show the source and motives of the persecution.

* * *

(tr. 1580) * * *

Q Uh-huh. Now on or about the 26th of October, 1950, did you meet Hank Farash again in High Point?

A Yes, sir. It was exactly two weeks later that he called me again and asked me what was my decision, and I told him that I had decided to accept the invitation to

join the Communist Party, and he told me to meet him again at the Elwood Hotel, and I went there, and there I met Hank and from there we went to his automobile, where I met Eugene Feldman and Junius Scales.

Q Were you informed at that time as to what you would have to do to join the Party, Mr. Childs?

MR. SMITH: By whom?

BY MR. GAVIN:

Q The defendant, Scales, was present, was he not?
A The defendant was present; yes, sir.

Q All right. Were you informed by anyone about the necessary steps to take towards joining the Communist Party?

A I was supposed at that meeting to pay the initiation fee. I think that this was a fifty cent fee required to become a member.

Q Well, did you pay it?
(tr. 1581) A Yes, sir.

Q Did you pay it with your money?
A No, sir; I borrowed it from Junius Scales.

Q Now who else was present at that time?
A At that time Hank Farash, Eugene Feldman, Junius Scales and myself.

Q Well, were you assigned to a club in the Communist Party at that time?

A I was assigned to work in this club with Eugene Feldman, and Virginia White. * * *

Q Now who assigned you to this club, Mr. Childs?

A I was assigned to this club by Junius Childs?

Q Who was the Chairman of your club?

(tr. 1582) A The Chairman of our club was Eugene Feldman, as suggested by Junius Scales.

Q You did not have anything to do with the appointment of a Chairman?

A I had nothing at all to do with it; no, sir.

* * *

(tr. 1584)

BY MR. GAVIN:

Q Mr. Childs, were you assigned by the defendant, Scales, to work in the Labor Youth League?

A My assignment was to work in the Labor Youth League, try to recruit members, members for the Labor Youth League. Feldman's assignment was to work in his community, and Virginia White's assignment was to work with peace groups.

* * *

(tr. 1585) * * *

Q Do you know what office the defendant, Scales, was holding in the Party during that time?

A Yes, sir.

Q From your admission to membership until April of 1955?

A I know what office he held, sir, at the time I was invited to join the Party.

Q All right. What was that?

A He was Chairman of the North and South Carolina

Districts of the Communist Party of the United States.

Q Do you know what the duties of his office were?

A I understood that the duties of his office were to see that the Directors of the National Committee of the Communist Party, were, were reported to: he reported to (tr. 1586) the National Committee as to the activities of the Communist Party North Carolina, and to see that the directives of the National Committee were carried through.

Q Mr. Childs, did you ever meet one by the name of William Patterson?

A Yes, sir.

Q Where did you meet him?

A Well, the way this came about was that I received a telephone call in High Point from Hank Farash, who was in Winston-Salem. Hank Farash told me that he wanted me to come to Winston-Salem, that he had an important job he wanted me to do, and I went to Winston-Salem, and I met Hank Farash at the bus station there, that Hank Farash told me that William L. Patterson would be, the National Chairman of the Executive Committee of the Civil Rights Congress, was in town, and he wanted me to be his bodyguard or security man while he was in North Carolina.

Q Well, were you, or did you act as such while he was in North Carolina?

A From, yes, sir; I acted as his bodyguard from that night up to the time he left Friday morning.

MR. SMITH: Could I ask the date of this occasion, Mr. Gavin?

BY MR. GAVIN:

Q Do you have the date?
(tr. 1587) A I have the date; yes, sir.

Beginning at approximately 4:30 p.m. on Februar 20th, 1951, up to approximately 3:00 a.m. on the fo lowing Friday morning.

MR. SMITH: What date would that be?

THE WITNESS: Well, approximately 23rd of Feb ruary.

BY MR. GAVIN:

Q Where did you go with Patterson?
A Well, I went to the Patterson, to several places i Winston-Salem. One of those was the attorney's offic in Winston-Salem who was working on the Clyde Brow case there.

I also went with him to give a speech in a school ther in Winston-Salem. I went to give a speech in Chapel Hil I went with him to give a speech in a church in Winsto Salem, too.

Q Did you ever go with him to the home of the d fendant, Junius Scales?
A No, sir.

Q Was Scales with you at any of the times you w with Patterson?
A Yes, sir.

Q When was that?
A That was at a speech he gave on Thursday, Wedn

day night in Chapel Hill.

(tr. 1588) Q Who gave the speech?
A William L. Patterson.

Q What did he speak about, Mr. Childs?
A Well, his speech concerned the Korean War, and in this speech he pointed out that the Korean War was being used by the capitalists as a means of oppressing the Negro people.

He said that, he said that the capitalists are sending the Negroes to Korea to fight the Korean people who are trying to fight for their rights, the same as the Negro people are in the South.

He said at one point that the whole Government is run by criminals, every city, state and county official background can be traced and will be, can be shown to be a criminal.

He said that the people in the South, the Negro people in the South, want their rights, and what he said exactly was (referred to notes)—

MR. SMITH: While the witness is looking, Mr. Gavin, would you ask him where this speech took place?

MR. GAVIN: He said Chapel Hill.

MR. SMITH: But where?

MR. GAVIN: Just a moment. Go ahead and find it.

THE WITNESS: Here is one paragraph from his (tr. 1589) speech. In Korea there still—do you want me to use his exact words?

In Korea they are still called niggers. Niggers are courtmartialed for refusing to have their men slaugh-

tered. Lieutenant Gilbert is one example. They sa
that the nigger is yellow. Yellow, give the nigge
in North Carolina and Georgia rifles and tell them
fight for their rights. Yellow, man, you will s
fighting like you have never seen before.

And he goes on to discuss the fact that he does not wa
to go slow as far as getting democracy for the Negr
people in the South, that what he wants is the democrac
today. He does not want to wait for the tomorrow, sa
that tomorrow's democracy is all right for his childre
but he wants his today.

BY MR. GAVIN:

Q You say those are the exact words of William L
Patterson?

A They are the exact words of William L. Patterso
as I read them.

* * *

(tr. 1596) * * *

Q Now did you see Scales again in Winston-Sale
at the Hutchinson Soda Shop in July of 1952?

A Yes, sir. After a Communist Party Club meeti
one night, we, Junius Scales and I, had agreed to m
the next morning at the Hutchinson Soda Shop ne
Sears, Roebuck in Winston-Salem. There he showed
a copy of the, of an article which he was writing cal
something along the line of Male Supremacy and C
Work Among Women. This report he said was in
hands of the National Committee and that he wanted
to read it and look it over.

He also said that he wanted me to give some statistics concerning the employment of ladies in industry in Winston-Salem, if possible.

Q What did he say at that time about attending meet-
(tr. 1597) ings of the National Committee in New York?

A He also mentioned that he attended meetings of the National Committee in New York City, and he said that the National Committee had instructed him to relax security.

Q Now did he inquire of you at that time concerning your employment at Western Electric?

A We discussed the fact that I was still employed there and that either was at or later, a shop steward at Western Electric—

Q Did you show him any literature that you had found at Western Electric?

A Yes. The Western Electric Company has a policy of having a rack on which the employees can take books home. These books or pamphlets which the employees can keep. Now I had several of those with me.

One which I recall distinctly was the one Our Own Communists Can Cripple Us. I showed it to Scales and he looked it over and he said that we should keep a list of the authors of these books and shoot them some day.

Q What did he say to you at that time about the importance of your remaining in industrial employment, Mr. Childs?

A Well, he told me that I should remain in the industry, that I should stay at Western Electric, that I

should try to become a leader among the workers at Western Electric because in the next presidential election they (tr. 1598) expect a crisis, and if I could—I had mentioned that I was planning to return to school—and he said that if it was a little earlier or a little later, he could see my returning to school, but it would take at least six years for me to finish school, and by that time things would have come to a head and it's necessary for the Party to build a broad mass and gain the road of leadership among the broad mass.

Q Did he say anything to you about the Red Army liberating us?

A Well, in connection with his speaking with me, and remaining in the Western Electric Plant, he told me that in connection with this coming to a head, that he did not want, that we did not want the Red Army, we did not want the Red Army to have to liberate us, meaning by that, with my understanding, was that if the Communist Party does not have a broad mass able to lead a broad mass of the people in a revolution, then it is quite logical that these leaders of the revolution will be placed in the jail and then it will be necessary for the Russian Army or the Red Army to come to the United States to liberate these leaders.

Q What did he say about Bernard Friedland?

A In connection with this, he mentioned that Bernard Friedland had wanted, much wanted to become a doctor, that he had never given up the hope of becoming a doctor, (tr. 1599) and that he has put it off at the request of the Communist Party.

* * *

(tr. 1600) * * *

BY MR. GAVIN:

Q I want you to refresh your recollection from your reports relative to the defendant's statement on the Red Army and give us his exact words, please, sir.

A His exact words as I have them in quotation marks here is, "We don't want to have to wait on the Red Army to liberate us. The trade unions are the schools of revolution."

Q Well, now does he have any more statements in there, or do you have any more that were made by him that explains his statement?

A He said just before that, that Junius told Childs that if it was a little earlier or a little later he could see his returning to school. However, with things moving as fast as they are, it will be an economic crisis during the next presidential administration, at which time, "Things (tr. 1601) will come to a head." If it will take at least six years for Childs to complete his schooling, during this time he will need to have to get a firm foundation among the workers in his plant and all other peoples.

Q All right, sir.

Now what did the defendant say to you about having been employed by the City of Greensboro?

A He said that he at one time had been employed by the City of Greensboro and that he at that time made an approximate seventy-five dollars per month and gave about forty of that per month to the Party.

Q Did you discuss his ever attending a Communist Party School, Mr. Childs?

A Yes. He mentioned that he had attended a Com-

munist Party School in 1940.

Q Do you know where that was?

A I recall him mentioning it somewhere in the mountains.

THE COURT: 1940, did you say?

THE WITNESS: Yes.

BY MR. GAVIN:

Q Do you know who he had classes under at that school, Mr. Childs?

A I don't know who he had classes under at that school, but I do know that a person with whom, under whom he did have a class.

(tr. 1602) Q Who was that?

A That was George Siskind.

* * *

(tr. 1603) * * *

Q Was there any discussion at that time about a Party School to be held in the near future?

A Yes. He told me that the Party was planning to have a training school for outstanding cadres in the North Carolina area, district. He said in the Party School of this type that eight people, with less than eight people would not be enough, more than ten people would be too much.

Q Now, he stated—did you give us the date that the school was to be held, Mr. Childs?

A Well, he told me later that the date would, the school would be from about the 8th of August, or 9th of August

10th, 195- hrough August the 17th, which would be a Sunday, the following Sunday.

Q Where was the school to be held?
A He did not say at that time.

Q Well, now later on were you informed as to where the school would be?
A Yes, sir.

(tr. 1604) Q When was that that you were?
A Well, later, after a Party meeting he and I went to the Picadilly Restaurant, and he gave me, he discussed the School with me, and he had previously said that they had gone to an awful, they had gone to a lot of trouble to have the right teachers for this Party School, and he gave me a list of equipment and a list of books which I was to bring to the school with me.

* * *

BY MR. GAVIN:

Q I hand you what has been marked for identification as Government's Exhibit No. 113 and I will ask you to identify that for the Court and the jury.
A This is a list of equipment needed to bring, absolute minimum baggage, and included—this was written in my presence of Junius Scales.

Q Read it, please.
A One change of underwear and socks, one work shirt, long sleeves preferred, one pair rough washable long trousers, not shorts, one pair unfancy low-heeled shoes, no sandals or open toes, one durable raincoat, one hat or cap with wide brim optional, one bed sheet, one bath towel, one wash cloth, one cake of soap and soap dish, one flashlight, (tr. 1605) one copy history of the C.P.S.U.—that's cor-

rect—the Communist Party of the Soviet Union—one copy Ten Classics of Marxism, one knife, fork and spoon, toilet articles, notebook.

MR. GAVIN: We offer this as Government's Exhibit No. 113.

BY MR. GAVIN:

Q Now was there anything said to you about what address you could give out, or how you might receive mail?

A Well, he told me that the security measurements being taken at the school were that we were not to tell anyone where we were going, were were not to tell other Party members where we were going, we would not be permitted to use the telephone, it would not be any mail being sent or received, and no one would be permitted to leave the school before it was over.

Also at the school the people were to use assumed, false names because of protection of the people.

Q Now who was the director of that school, Mr. Childs?

A The director of the school was Junius Scales.

Q Do you know who was to be the teacher?

A I was not told at that time. I think at one time he said that an old friend of mine would teach something.

* * *

Q What was the purpose of the school?

A This school was a Party training school for outstanding cadres in the North and South Carolina and Virginia Districts of the Communist Party.

* * *

(tr. 1607) * * *

BY MR. GAVIN:

Q How many students were at this school, Mr. Childs?
A I'd estimate approximately at one time or the other there was about fifteen or sixteen people there.

Q Hmm-hmm. Do you know whether there was any labor leader from New York present?
A Yes, sir.

Q Who was that?
A He was Abe.

Q Abe, who?
A Well, he used the name Abe. I'd met him before in New York City.

Q Now who was he? What was his duty?
A Scales said that Abe was a representative of the Educational Committee of the National Committee of the Communist Party.

Q Now did the defendant, Scales, say anything to you about arranging a private meeting for you and Abe?
A He said that he would see if he could not arrange a (tr. 1608) meeting, a private meeting between Abe and myself to discuss my union activities at the Western Electric Plant.

Q What about a private meeting between you and Abe, Viola Brown?

A He also mentioned at that particular time in Winston-Salem, I was supposed to discuss with a Party member how to operate in the union at Western Electric, and he told me that the Party member with whom I could discuss those things was Viola Brown, and that these arrangements could be made through Warren Williams because Warren Williams had some connection with the Food, Tobacco and Agricultural Union there and it would be all right for him to call Viola Brown and make these arrangements.

Q Did you know where this school was to be held?

A No, sir.

Q When were you picked up by the defendant, or were you picked up by the defendant to be carried to the school?

A I was picked up to go to the school on an early on Saturday morning in Winston-Salem, and I was picked up near the Baptist Church there on, right close to Fourth Street, and from there I met Junius Scales, George Van Camp and Abe.

Q Well, now, was that on August the 10th, 1952, Mr. Childs?

A That was on August the 9th.

(tr. 1609) Q All right. Where did you go from there?

A From there we went up town where we got some groceries and then we went to the home of, or the farm of William Binkley.

Q Where is the farm of William Binkley?

A The farm of William Binkley is located at Walnut Cove, which is near Winston-Salem.

Q Well, now, Mr. Childs, did you use your name while you were up there?

A No, sir.

Q What name did you use?
A I used the name of Phil.

Q Why?
A I beg your pardon?

Q Why?
A Well, he, Scales, had told me that all Party members there would, or all members there would be given false names in order to protect their true identity.

Q Did Seales have a false name?
A Scales did not have a false name and he explained the reason for that was he was so well known it wouldn't do any good to have a false name anyway.

* * *

(tr. 1610) * * *

BY MR. GAVIN:

Q Mr. Childs, I think I had asked you what arrangements had been made to take care of the students up at the Binkley farm, how you were to sleep. If you will tell us that, please, sir.

A The arrangements for sleeping were that we placed two large pieces of cayvas out among the trees, and we were to sleep on army cots, and I understood that the expenses were being paid by the Communist Party.

Q How about food?
A Well, the food was being paid for by the Communist Party.

Q Now I want you to describe to the Court, please, and the jury, how your student body was broken down into

(tr. 1611) groups for instruction.

A The school was broken up into three groups, and each of these groups had an assigned group leader, and the school would operate on the basis of the school generally assembling in the morning and having an assignment. The assignment would include such things as some problems. Then it would break up into the groups. There the reading would take place, discussions and recommendations, and then these groups would reassemble and the whole school would have a discussion on the problems and the lesson, and the same thing would happen in the afternoon.

Q Now were you a leader in your group?

A Yes, sir; I was a leader of my group, which was composed of myself, George Van Camp, Viola Brown and Junius Scales.

Q Who appointed you as leader of that group?

A The group leaders were appointed by Junius Scales.

* * *

(tr. 1612) * * *

Q Now you started out on a Sunday, did you not?

A We arrived there on Saturday and school started on Sunday. Yes, sir.

Q Did you have a schedule for each day's work?

A Yes, sir, we had a schedule for each day.

Q Well, if you can tell us about your schedule and what you were to study there on Sunday, the organization for Sunday.

A Well, I made some notes at that school.

* * *

(tr. 1613) * * *

Q Well, now, if you can tell about it, without referring to your notes, go ahead and do so. If you cannot, and need to use your notes to refresh your recollection, you may refer to your notes and describe to us the work that you did on Sunday there at the school.

A The agenda for the school was first detail work which consisted of washing dishes and cleaning up, and then the program of sessions was theory study among the students, and then a formal study of the theory. Then the individual analyses of theory in relationship to his or her work and means of improving it.

A collective discussion of theory and work, and conclusion of discussion in the form of what is to be done in work.

The assignment for Sunday and Monday included these things: Ten Classics of Marx, page 20, 29; Lenin's Imperialism, 88 to 98; pages 203 to 204 Eaton's Political Economy, pages 167 to 170, History of the Communist Party of the Soviet Union, and then in connection with that day, we had this problem.

(tr. 1614) Now these problems were questions which were thought up which a typical worker might ask in a plant where we were working, and we were to be able to answer these questions on the basis of what we were taught at the school, and these questions were to try to explain to the worker and turn the question around, such as the answer would be beneficial to the Communist Party.

Their problem for this day is We have to stop communism, the main danger. We are fighting for freedom here, and abroad against aggressive Soviet imperialism—

Q How did you answer that, Mr. Childs?

A Well, first, take the first part of question, statement, We have to stop communism, the main danger. Well, we were to point out that the main danger is not communism, but the main danger is really capitalism in the United States.

Now the second part here is, We are fighting for freedom here and abroad. First of all, we are not fighting for freedom here because there is no freedom in this country, and as far as abroad, and an aggressive imperialism, we were to point out Soviet imperialism, we were to point out that it is not an aggressive imperialism. It is really the United States which is imperialistic.

Q You testified that you studied the History of the Communist Party of the Soviet Union?

A Yes, sir.

(tr. 1615) Q And particularly pages 167 to 170?

A Yes, sir.

Q Your Honor, at this time, I would like to read page 167 and just a portion of 168 of Government's Exhibit No. 19 which is the History of the Communist Party Soviet Union, and has been identified by the witness as being the identical book which was used by him up there at the school.

"Theory and tactics of the Bolshevik Party on the question of war, peace and revolution. The Bolsheviks were not mere Pacifists who side for peace and confine themselves to the propaganda of peace, as the majority of the left Social Democrats did. The Bolsheviks advocated an active resolutionary struggle for peace, to the point of overthrowing the rule of the bellicose Imperialist Bourgeoisie. The Bolsheviks

lined up the cause of peace with the cause of the victory of the Proletarian Revolution, holding that the surest way of ending the war and securing a just peace, and peace without annexations and indemnities was to overthrow the rule of the Imperialist Bourgeoisie. In opposition to the Mensheviks and Socialist Revolutionary renunciation of revolutions and their treacherous slogan of preserving civil peace in time (tr. 1616) of war, the Bolsheviks advanced the slogan of 'Converting the Imperialist War into a Civil War.'

"This slogan meant that the laboring people including the armed workers and peasants clad in soldier's uniform were to turn weapons against their own Bourgeoisie and overthrow the rule if they wanted to put an end to the war and to achieve a just peace. In opposition to the Mensheviks and Socialist Revolutionary policy of defending the Bourgeois fatherland, the Bolsheviks advanced the policy of 'The defeat of one's own government in the imperialist war.' This meant voting against war credits, forming illegal revolutionary organizations in the armed forces, supporting fraternization among the soldiers at the front, organizing revolutionary actions of the workers and peasants against the war and turning these actions into an uprising against one's own imperialist government.

"Bolsheviks maintained that the lesser evil for the people would be the military defeat of the Czarist Government in the imperialist war. For this would facilitate the victory of the people over Czardom and the success of the struggle of the working class for eman-

(tr. 1617) cipation from capitalist slavery and imperialist wars.

"Lenin held that the policy of working for the defeat of one's own imperialist government must be pursued not only by the revolutionaries but by the revolutionary party of the working class in all the belligerent countries. It was not to every kind of war that the Bolsheviks were opposed. They were only opposed to wars of conquest or imperialist wars. The Bolsheviks held that there are two kinds of war. A just war, wars that are not wars of conquest, but wars of liberation waged to defend the people from foreign attack, and from attempt to enslave them forever or to liberate the people from capitalist slavery, or lastly, to liberate colonies and dependent countries from the yoke of imperialism and, be, unjust wars, wars of conquest waged to conquer and enslave foreign countries and foreign nations, wars of the first kind the Bolsheviks supported. As to wars of the second kind the Bolsheviks maintain that a resolute struggle must be waged against them to the point of revolution and the overthrow of one's own imperialist government."

Now, Mr. Childs, if you will go to Tuesday—

Strike that, please. You stated that you studied different (tr. 1618) topics as outlined by you, from the Ten Classics of Marxism, Lenin's Imperialism and History of the C.P.S.U. After you studied and discussed these topics, did you reassemble in a body?

A We would reassemble and discuss the problem and the selections which we had read.

Q What did you take up on Tuesday?

A On Tuesday the assignments were Lenin's State and Revolution, pages 7 through 15, the first three sections of the first chapter.

I have listed here the alternates. The Nature of Capitalism, pages 80 through 87, Twilight of World Capitalism, pages 53 through 59. The fourth selection is Political Affairs, issued of the 1948 Convention, pages 778 through 785, second column. Ten Classics of Marxism, Foundations of Leninism, pages 47 through 51, and pages 57 through 60.

Q Now did you have certain problems for the readings under the Foundations of Leninism?

A We had in connection with these assignments four problems.

Q Do you have those in your reports? Do you list them?

A Yes, sir.

Q Give them to us, if you can, without referring to your reports, but if you need to refresh your recollection, you (tr. 1619) may do so.

A Well, from the notes which I took at this school the roblems are, first, this is one country indivisible with lib-rty and justice for all. We have freedom of speech, press, ssembly and worship, and we vote for the government of ur choice.

Q Now were you taught as to how you should explain at, how the Communist Party would attempt to explain at?

A Yes, sir. The answer which we were to give was that s, first of all, as to a country indivisible, we were to nt out to the workers that it really is not one country in-isible; we have class divisions. We have the workers l we have the plant owners. There is a distinct division,

even within these two divisions, there are more or less, even more subdivisions, such as, among the workers, you have the Negro and the whites; in the unions you have the A.F. of L., the C.I.O., and F.I.O. and the independent unions.

As far as liberty and justice for all, we were to point out that there is no such thing as equal justice for all because the courts are controlled by the United States Government, and to point out the contrast between the justice or sentences given to working class people compared, compare that with the rich people, and also to point out the treatment of the Communist Party leaders, the Negro people, the trade union leaders, the working people and the rich people.

(tr 1620) As far as the statement, "We have freedom of press," we were to point out that the capitalists own the press and that they naturally want freedom of the press because they already own the press, and we were to point out that the letters of the editors are selected by the press itself, and point out how the press treated the Progressive Party Convenion.

As far as freedom of assembly was concerned, we were to show that the public assemblance halls would not be rented to any Communists or peace council. In meeting freedom of worship, we were to point out that Jewish synagogues had been bombed and that Negro people cannot attend white churches.

And in discussing with the workers the fact, the statement that we vote for the government of our choice, we were to point out that the poll tax prevents a person having a free vote, and that the presidential nominees are decided or chosen in smoke-filled rooms.

Q Mr. Childs, why were you given these problems in the first place?

* * *

(tr. 1621) * * *

Q Mr. Childs, were these problems given to you at the school for study?

A Study. These problems were given to us at the school. The selection of the problems were based on the problems were given to us by the staff. They were the purpose of these problems, were to apply the theory which we were being taught to questions which would be asked, which might be asked us by workers in the plants.

Q Now were you given that theory there at the school by the staff?

A Yes, sir.

Q Who in particular, if you recall?

(tr. 1622) A Well, I recall that on my section was Junius Scales, in my group. There was Bob Handman and Viola Brown was also a member of the faculty and Abe.

Q All right, sir.

Now will you go to the second problem which was given to you at the school, Mr. Childs? Tell us what that problem was.

A The second problem was, if you Communists are so revolutionary and want to establish socialism, why do you hide behind the Bill of Rights and what you call Bourgeois Democracy?

BY MR. GAVIN:

Q What answer were you given at the school, Mr. Childs

to Problem No. 2?

MR. SMITH: May I ask by whom? That is the same question we had awhile ago.

THE WITNESS: Well, this is things which I have recorded here, is the suggestions, the collected suggestions of the school.

BY MR. GAVIN:

Q Now for the record again, what office did Junius Scales hold with that school?

(tr. 1623) A He was the Director of the school.

Q And who was on the staff, Mr. Childs, as teacher?

A It was my understanding that the staff was composed of Viola Brown, Junius Scales, Abe, and Bob Handman from Virginia.

Q Now I think you previously stated this, but I want to be correct—at the end of each day did your groups meet together and discuss these problems as you had discussed them in the individual groups?

A Yes, sir. The whole school discussed these problems.

Q And was Junius Scales present?

A He was present; yes, sir.

Q All right, sir.

Now will you tell us the answer that was given to you in the school to Problem No. 2?

A As to that answer, was to try to tell the workers that the Communists are trying to save the right in the Bill of Rights and that they're not hiding behind the Bill of Rights. They are standing in front of the Bill of Rights defending them. We are to explain that in reality the Communist

Party wants more rights for the people, and an end of exploitation and that we see that in reality in this country we have the people being denied the Bill of Rights through the lack of all FEPC, Taft-Hartley and the Smith Act, and the Party must struggle on every level.

(tr. 1624) Q Now, Mr. Childs, were you given a third problem for study at the school?

A Yes, sir.

Q What was that problem?

A This problem was, Is this country Fascist now? If Fascism developing in the United States, how, illustrate with several examples close to home.

Q Now do you know what answer was given to you by the staff of the school to that problem?

A I recall that this was not an exact discussion on that problem. I'd like to read that from my report, if I may.

Q All right, sir.

A In the general school there was not a discussion of Problem 3, but there was a discussion of Problem 3 I recalled in my group.

Q Junius Scales was in your group?

A Yes, sir.

Q All right, sir. Go ahead and give us what that discussion was.

A In answering that question we were to say that the, that the Party, I mean as far as Fascism in this country today goes, that we were to say that it's not Fascism now because if it was, then the Communist Party could not exist in the United States, but that the Communist Party can help avoid the establishment of Fascism in this country.

(tr. 1625) Q. Is that the total of your notes there on that problem?

A On that problem; yes, sir.

Q All right, sir.

What was the fourth problem given to you for your study at the school, Mr. Childs?

A The fourth problem was, why can't an American capitalist go to the U.S.S.R. and distribute a pamphlet attacking socialism?

Q Now what answer did you get to that problem?

A Well, we were to say to the workers and point out that the reason that a capitalist cannot go to the Soviet Union to distribute an anti-Soviet Union pamphlet, compare that to letting a mill owner go to a union meeting and distribute antiunion leaflets, and in these discussions with the workers we were to point out the contrast between worker's position under capitalism and the worker's position under the dictatorship of the Proletariat in the Soviet Union.

Q Well, what was the comparison made of working conditions in Russia and working conditions in this country, sir?

A It was said that—

MR. SMITH: May I ask again, by whom?

BY MR. GAVIN:

Q Was this in your group?

(tr. 1626) A I recall, sir, that this, this, the notes which I have here refer to the whole school assembly which is discussing now that problem on the distribution of pam-

phlets in Russia by capitalists.

Q Was Junius Scales present?

A Yes, sir.

Q All right, sir, go ahead.

A We were to point out the contrasts between the workers' position under capitalism with that of the dictatorship of the Proletariat as exists in the Soviet Union. We were to point out that the workers in the Soviet Union have more freedom, that they have complete control of their unions, and over all their positions much better than that under capitalism.

Q Now, Mr. Childs, if you will refer to your notes for Wednesday, state to us what you studied at that time.

To refresh your recollection I will ask you if you recall that date studying about the Negro nation?

A Yes, sir.

Q Now, go ahead and tell us what you did study on Wednesday.

A On Wednesday, among those things discussed was the Negro question. Now here we were given an assigned reading from Gus Hall, Marxism and Negro Liberation, pages 12 through 24; Pettis Perry, White Chauvinism and (tr. 1627) the Struggle For Peace, pages 8 through 17, and we were to have to discuss Negro white unity and fighting which cauvinism on a mass scale.

Q Was white chauvinism explained to you there at the school?

A Yes, sir.

Q As what, Mr. Childs?

A It was explained to me at the school that white chauvinism is the feeling of the white people, or a white person as being a feeling of, or manifestation of superiority be-

cause of the person's being white.

Q Well, what attitude were you taught that you sho take with respect to white chauvinism as a good Co munist?

A We were not supposed to have white chauvinism any way, or demonstrate it in any way, although inheren all white people do have white chauvinism and the Party constantly struggling to try to get white chauvinism of its members.

Q What were you taught at the school relative to Communist Party's definition of a nation?

A Well, the definition of a nation comes from Stali definition of a nation, in a report from the definition of a tion, first according to Stalin, a nation must have an h torically evolved stable community in applying this to Negro people in the Black Belt. It was pointed out th there are ten to eleven million, which is larger than (tr. 1628) population of Sweden or Norway. It has p marily an agrarian, such as, cotton and plantation econom a centralized, in twelve states, which constitute the Bla Belt. There are one thousand one hundred eighty counti with fifty to eighty per cent Negro people, of the populati being Negro people, and around those one thousand o hundred eighty counties there are two hundred counti with from thirty to fifty per cent of the population bei Negro, and around those one thousand one hundred eigh counties there are two hundred counties with from thirty fifty per cent of the population being Negro people.

The historical background is of slavery in the Black Be It has a language which is English. It has a territory whi

is the Black Belt. It has an economy which is agrarian, agriculture, one crop and of a plantation type.

Now as to the psychological make-up it has distinct interest and attitudes, has its distinct organizations, churches, and art.

Now as to the economy, you have a division of labor, city and county linked by commercialization, transportation, financial interest and class structure. It is exploited as a worker, as a Negro; the middle class is also exploited and oppressed.

It was said that we must unite, assist and speed up the movement within and without our country. It was shown (tr. 1629) that the relationship between the colonial, national liberation movement and the Negro people, pointed out that these should merge, because neither can win without the other. It was also discussed about the leading role of the Southern workers and there were some problems relating to the Negro question.

Q Now on Thursday did you have a discussion of the Communist Party?

A Yes, sir.

Q Was that discussion based on the History of the Communist Party of the Soviet Union?

A Yes, sir.

Q Go ahead, Mr. Childs, and tell us briefly what that discussion was.

A The discussion of the Communist Party of the Soviet Union was shown to be a historical achievement of the Party. It was a new type of Party in 1903. It strengthened its unity, it exposed and dispelled disruptive elements which set an example of courage. It developed Marxist theory. It won the masses. It defeated nations. It defeated invaders

from fourteen nations.

It made modern industrial and agricultural nations. defeated Fascist attack in the main single-handed and t day it is well on its way to building communism.

THE COURT: On its way to doing what?

THE WITNESS: To building communism.

* * *

(tr. 1630) * * *

BY MR. GAVIN:

Q Mr. Childs, you were discussing the history of th Party as taught at the school. If you will continue wit that, please, sir.

A In reference to our Party, the task is to Bolshevi our Party and point out our, some of our weaknesses an problems, such as, the Bourgeois background of Soviet members and that decision is based on convention and th Bourgeois thinking on democracy.

In connection with this, we were told not to forget tha we are the vanguard, meaning Roman van, coming from which means that the first attack of the army—among thos things were weaknesses, was not handling masses in struggle to get out of Korea when the Korean War firs started, letting veterans committees work fold up. We did not present a petition to the governor, members are mainly middle class, and we need those in industrial concentration We need better club composition, such as, having the same (tr. 1631) plants in industry, having people in the same plants in a club. If you don't have enough members in the same plant, perhaps all those in the same type industry such as, textiles or tobacco.

* * *

And we have a reading from Foundations of Leninism, pages 109 through 117, 119 through 124. The problem given (tr. 1632) in connection with this was what proposal can you make to your group which will serve to Bolshevize and strengthen our Party?

Q What were the answers as were given to you at the school to that problem?

A We had twenty answers or suggestions on how to Bolshevize our Party. These were bringing good and close attention to criticism and self-criticism. Second thing was opportunism does not gloss over opportunism, and the third one was apply in day-to-day all, to all aspects of our life the teachings of Marxism and Leninism.

The fourth thing was correct left sectarian errors. The fifth thing was over- and underestimating militant situation of workers. The sixth thing was acceptance of leader. of leadership. The seventh thing was recognition and appreciation of our role of the vanguard.

Eighth thing, organize to hit issues when they are hot. The ninth thing, real meaning of security. The tenth. strengthen our ties with working people. Eleven, theoretical study. Twelve, the Party first consideration always. Thirteen, we are not sacrificing, we are making a contribution.

Fourteen, fractionalism, failure to carry out the decision of the majority in the higher organizations of the Party. The fifteenth thing was more education, more educational functions are necessary. Sixteen, lack of understanding the main line or deviating from the main line of the (tr. 1633) Party. Seventeen, struggle. Eighteen. change the composition of our Party, heavy industry in textiles.

Nineteen, salf-study group, study to develop understanding between theory and practice. The twentieth thing is to grow.

Now that was about what we covered in trying to Bolshevize our Party.

Q Mr. Childs, you stated that you were told to apply theory of all aspects of day-to-day life.

A Yes, sir.

Q Can you explain that more fully as it was explained to you at the school?

A Well, it was explained to us that what this meant was in all our work, in all our contacts with every person that we met in our union, work in any church organization, we are to apply to these situations the Marxism-Leninist and Stalin teachings which we know of.

* * *

(tr. 1634) * * *

Q Mr. Childs, to go back a moment, you were stating before the recess about your discussion on Wednesday relating to a Negro nation. I want to ask you if you were given any practical problems for study in connection with that topic?

A Yes, we were given three problems in relation to the Negro question.

Q What was the first problem?

A The first problem was, What makes our approach to the Negro question different from that of liberals and Social Democrats; illustrate from experience close to us.

Q Now what answer were you given at the school to that problem?

A Well, the Social Democrats look upon the question of Negro rights as being purely a legislative problem, that the Negro like, that the Negroes can get their rights through the legislative procedures which we have in this country.

They also look upon the Negro question as being a minority problem, whereas the Communists do not take this approach. Their approach is that the Negro is not just a minority group, that in the Black Belt it constitutes a nation, and that the Communist Party does not consider that (tr. 1635) the rights of the Negroes can ever be achieved through the legislative actions, that the Negro nation in the South has the right to secede if it wishes, but the Communist Party takes the position that under the capitalism it can never have that right.

* * *

(tr. 1639) * * *

Q Well, now, on Friday you began a study of Strategy and Tactics, did you not, Mr. Childs?

A Yes, sir.

Q Will you describe that course to us?

A The course in Strategy and Tactics came from Foundations of Leninism, Chapter 7, and is reference page 88, 106. The Strategy and Tactics Chapter 7, Foundations of Leninism, The Stages of Revolution and Strategy are pointed out in the 1943, What is the Highest Stage of Trade Unionism in North Carolina, and also there was an article by Rockman, June, 1952, issue of Political Affairs, Task and Broad Flight For Peace.

* * *

BY MR. GAVIN:

Q I hand you Government's Exhibit No. 5, Foundations (tr. 1640) of Leninism by Joseph Stalin, and ask you if that was one of the books that you studied at the school? I direct your attention to pages 88 through 91 which you have just testified about as being entitled Strategy and Tactics. I ask you if that was the course that was taught to you there?

A This is part of the course which I took while at the school.

Q Will you state whether or not this is the identical book and the one which you received from the defendant?

A This is identical to the book which I used at the school.

Q All right, sir.

MR. GAVIN: If Your Honor please, I'd like to read relative to the three states from page 90 and 91 of that; it is Government's Exhibit No. 5, which the witness says is identical to the one that he had at the school.

> "First stage, 1903 to February, 1917. Objective: To overthrow the Czarism and completely wipe out the survivals of immediate evilism. The main force of the revolution: The Proletariat. Immediate reserves: The peasantry. Direction of the main blow: The isolation of the liberal-monarchy's Bourgeoisie, which was striving to win over the peasantry and liquidate the (tr. 1641) revolution by compromising the Czarism Plan for disposition of forces: Alliance of the working class with the peasantry.
>
> "The Proletariat must carry to completion the democratic revolution, by allying to itself the mass of the

peasantry in order to crush by force the resistance of the autocracy and to paralyze the instability of the Bourgeoisie.

"Second stage, March, 1917, to October, 1917. Objective: To overthrow imperialism in Russia and to withdraw from the imperialist war. The main force of the revolution: The Proletariat. Immediate reserves: The poor peasantry. The Proletariat of neighboring countries as probable reserves. The protracted war and the crisis of imperialism take the favorable factor. Direction of the main blow: Isolation of the Petty Bourgeoisie democracies (Kamenevs and Socialist-Revolutionaries), who were striving to win over the toiling masses of the peasantry and to terminate the revolution by compromising with imperialism. Plan for the disposition of forces: Alliance of the Proletariat with the poor peasantry.

"The Proletariat must accomplish the Socialist (tr. 1642) Revolution by allying to itself the mass of the semi-Proletarian elements of the population in order to crush by force the resistance of the Bourgeoisie and to paralyze its instability of the peasantry and the Petty Bourgeoisie.

"Third stage. Commenced after the October Revolution. Objective: To consolidate the dictatorship of the Proletariat in one country, using it as a basis for overthrow of imperialism in all countries. The revolution is spreading beyond the confines of one country: the period of world revolution has commenced. The main forces of the revolution: The dictatorship of the Proletariat in one country, the revolutionary movement of the Proletariat in all countries.

"Main reserves: The semi-Proletarian and small —peasant masses in the developed countries, the liberation movement in the colonies and dependent countries. Direction of the main blow: Isolation of the Petty Bourgeoisie democracies, isolation of the parties of the Second International which constitutes the main support of the policy of compromise with imperialism. Plan for the disposition of forces: Alliance of the Proletarian Revolution with the liberation movement (tr. 1643) in the colonies and the dependent countries.

"Strategy deals with the main forces of the revolution and their reserves. It changes with the passing of the revolution from one stage to another, but remains essentially unchanged throughout a given stage."

* * *

Q In that discussion was the position of the Communist Party outlined to you?

A It was explained to us that in the struggle for peace (tr. 1644) we were to show the connection between the struggle for Negro liberation and the central over-all issue of the struggle for peace. We were to fight against Wall Street which is trying to conquer and enslave other peoples, because at the same time the fight to liberate the already enslaved Negro nation—our duty is to have the Southern people to get organized, to give organized expression to their peace, their peace sentiments and, and create conditions for Negro liberation.

In this connection pointed out the relationship that England, English reaction, and the Ireland—some relation there—but what we were specifically studied that we could do in connection with this broad tactics of peace is always

have the initiative, placed in a newspaper, and have X mother, who asks that press be sent to their sons in Korea, and—well, what this reference is to contact a mother who had a son in Korea.

* * *

Q Well, now what were you to do if you contacted a mother who had a son in Korea, Mr. Childs?

A Well, try to get her to assist in getting a settlement.

* * *

(tr. 1645) * * *

Q Now did you mention something there about a strike?

MR. SMITH: If Your Honor please, could the record show that the witness has not been testifying but has been reading from these notes at the school?

THE COURT: Well, I do not know how much of it has been a direct reading and how much is simply reference to the notes for refreshment. Have you been reading verbatim or simply referring to the notes to refresh your recollection?

THE WITNESS: Well, I am trying to refresh my recollection because here in discussing this mother case, I just have here in my notes that X mother, ask mother that—who ask that parent of sons in Korea contact her. Well, I remember that what we were supposed to do was try to see this mother and talk to her, into doing this thing.

* * *

(tr. 1663) * * *

Q Mr. Childs, I want to direct your attention to Saturday morning now at the school, did you read James Jackson's article entitled The Theoretical Aspects of the People's Struggle in the South?

A Yes, sir; on Saturday, we discussed James Jackson's article from the August, 1950, Political Affairs, page 66, and Rockman article from June, 1952, publication. I do not have the exact publication—R-o-c-k-m-a-n—and also on Saturday—

Q Speak up just a little now, please.

A Also on Saturday, 3:30 p.m., we discussed Party building. That is—

Q Now who led the discussion on Party building?

A Bob Handman let the discussion on Party building.

Q And who did you say he was?

A He was the District Organizer for the State of Virginia, the Communist Party.

Q What did he say to you about Party building?

(tr. 1664) A In discussing the Party building, he started off by pointing out that the present era is an era of imperialism and as a result of this the world is divided into two camps. There is the Democratic camp which is led by the Soviet Union and the Eastern democracies and the anti-Democratic camps which is led by the capitalists of the United States.

The result of this division and era of imperialism is that the export of capital is necessary and, therefore, the capitalists seek to redivide the world. The result of this attempt to redivide the world is that the world is now ruled by force and Fascism.

Now also resulting is an uneven development in the world by capitalism, and the result of this is that the United States is headed towards another world war.

Now he wanted to know, he brought this question up,

How can this be stopped? This drive towards a world war by the capitalists of the United States. The final solution is to solve the economic crisis through the establishment of socialism. He said that the overthrow of the capitalists is necessary and this can be done only by broad mass coalition led by the Communist Party.

He explained to us that the tactics of the Communist Party is a broad coalition, the strategy is the overthrow of the capitalist government. The coalition which is the tactic to be used in the strategic overthrow of the capitalist (tr. 1665) government is to have a leadership by the Communist Party because only the Communist Party is armed with that theory, Marxism-Leninism, which is capable of overthrowing the capitalist government.

He said the role of the Party was the key and that there is no substitute for this role of the Communist Party. He told us that the Party must become a mass party, and then he spoke in relation, becoming a mass party, there was a mention of Winston-Salem.

There he mentioned the basic industrial workers and the result of a desire to have a broad coalition. He discussed the weaknesses in the Communist Party which has prevented it from having that broad coalition.

Q Before you discuss those weaknesses, Mr. Childs, will you tell us what was meant by a mass party, or how it was explained to you?

A Well, my understanding of what the Party meant by mass, a mass party, is that in this broad coalition, what the tactics of the Communist Party would be was that a person or several persons, were instructed to become members in organizations.

In the course of becoming members of these organizations, they would either become, develop themselves into role of leadership, or they would try to be in a position where they would influence the leaders of these organiza-
(tr. 1666) tions and at the proper time these people would be able to duly control these organizations either directly or indirectly.

Q Was there anything said about the Communist Party being a majority party, Mr. Childs?

A It was not said that the Communist Party has to be a majority party. The Communist Party in reality as in the case of Soviet Union was a minority party.

Q Now what weaknesses were pointed out in the Party?

A Well, these weaknesses were pointed out as having prevented the Communist Party from obtaining this mass coalition which is one of the tactics. Some of these things were lack of clarity of the vanguard role of the Communist Party.

What this means is that the Communist Party does not follow the workers in reality; it is supposed to lead the workers. The under-estimating the work—role of the working class. Now the role of the working class is very specific. and whereas the role of the Party is also very specific, and you must understand both of these, the role of the Communist Party is to lead the working masses to the overflow of the capitalist government.

He also mentioned that the Negro nation movement. also mentioned the cadres, and here he mentioned Stalin's quotation, national cadres determining everything, and also in reference to these mass organizations, one of the things that Communists are supposed to do is while in these
(tr. 1667) organizations try to find what people tend to

lean towards, the Communist Party policies, or what people might be able, what people they might influence to accept the Party's goals, and that is where they are supposed to recruit more members for the Communist Party.

Also mentioned that from the basic core we should recruit members.

Another thing he mentioned was the lack of industrial concentration, meaning by this that the Communist Party has a program of industrial concentration in which they try to get people, that is, people who are Communist Party members, into key shops or key industries which the Party has determined or designated to be industrial concentration industries or plants. This is so that the Communist Party members in a particular plant will be able to have a cell, or a Communist Party group in which they will be able to more effectively plan for such things as attempting to control the union in that particular plant.

In the national liberation movement he mentioned the slowness to recruit Negro people, their having a considerable loss of Negro people membership in the Communist Party, and one way of avoiding this, he recommended one way of keeping Negro people in the Party, is to promote them to roles of leadership.

Q. Now were you taught how those weaknesses could be changed, Mr. Childs?

(tr. 1668) A Yes, sir. He, in addition, he mentioned that the lack of attitude to develop our trade union cadre and youth, and here he mentioned that we must develop a distinguished or separate approach, or appeal to the youth of the country.

He also mentioned that there were too few schools and

classes and concrete assistance of the cadre in the industries.

When discussing how to reverse these weaknesses, he said that we must grasp more firmly the necessity of building our Party upon industrial concentration. He also mentioned in connection with this that we must have a new ideological struggle, we must have a relocation of our forces to key shops which is in complete agreement and following the program of the Communist Party of having industrial concentration, having people placed in key industries or plants which the Party is trying to infiltrate.

He mentioned the involvement of full membership in the plant and activation of industrial concentration program even if it is just planning, if they cannot actually go into a particular industry.

He also mentioned in overcoming these weaknesses that we should try to develop, pay more attention to the shop cadre and we should build industrial concentration and have a new check-up policy in the Communist Party, that is a (tr. 1669) check-up on the assignment of the Party.

Also he mentioned should have a recruiting plan for Communist Party members. What we should do is have from the District level on down a definite time program for recruiting members into the Communist Party from these organizations, or any other sources we might be able to recruit them.

Also in connection with this he mentioned that we should even actually estimate the number of Party, the number of Party members we expect to recruit by certain period, and if we fail to recruit this number of members, then we should be able to explain why we didn't and correct this mistake.

Develop that special approach to the youth and women, and again he mentioned the cadre policy that Stalin said that cadre deciding everything, and that we must fight on this principle and every member of the Communist Party should attend a Party school at least once a year.

Q By "he" do you mean Bob Handman?
A Yes, sir.

Q He was the leader of the discussion at that time?
A Yes, sir.

Q What did he tell you, Mr. Childs, about building a Party in the South?

A He said that in building the Party in the South, in recruiting members and knowing our members, we should become familiar with their background and struggles and (tr. 1670) character, their type, of this new recruit.

What he means by the struggles is that the Communist Party member is expected to participate in some activity which will indicate or might show that he is sincerely interested in participating in struggles, and these sometimes serve as a basis for becoming a Communist Party member.

* * *

Q Now who did you say that Abe was?

A Abe was the representative from the Educational Commission of the National Committee of the Communist Party.

Q Did you have a discussion with Abe and in the presence of the defendant, Scales, relative to your staying in school at that time?

A Yes, sir. What happened was that Scales arranged a private meeting between the staff of the school and myself;

the purpose of this meeting was to discuss my returning to college. I had expressed a desire earlier to return to college, and this was the meeting to discuss this between myself and the faculty of the school.

Now at this meeting they pointed out to me that the Party program was not returning to school, or college, but the Party program was industrial concentration and they explained to me the Party's position, that I should remain in industry because it was necessary for me to keep a contact with the broad masses of the people.

At that time I was working in a plant which had a union and they considered that extremely important because it (tr. 1671) was important to the Party's program.

Also in connection with this returning to school Abe said that if I would remain in my plant, and organize a club there, then they might send me to a National Party Training School for six months. Bob Handman from the State of Virginia told me that he lacked three months completing his master degree requirement when he was called upon by a woman to become a full-time functionary for the Communist Party, and he quit school, and although he only lacked three months in completing the requirement for his degree.

* * *

(tr. 1675) * * *

Q Now I hand you what has been marked Government's for identification, as Government's Exhibit No. 115 and ask you, please, to identify that document.

A This is the newspaper, For A Lasting Peace For A People's Democracy.

Q What is the date of it?

A The date is Friday, June the 20th, 1952. Bucharest

organ of the Information Bureau of the Communist and Workers Party.

Q Where did you get, or have you seen that before, Mr. Childs?

A. Yes, sir. This was given to the group leaders, a copy by Junius Scales, at the end of the Communist Party Training School at Walnut Cove.

Q Were you a group leader at that school?

A I was, sir.

Q Is that the copy that you received?

A This is the copy which I received at the school from Junius Scales.

* * *

(tr. 1677) * * *

Q Do you know whether or not this exhibit For A Lasting People and A People's Democracy, Exhibit No. 115, was used in preparing leaflets for study or distribution?

A I recall that we have used that newspaper for leaflets. We have used material from that newspaper. Yes, sir.

MR. SMITH: Talking about this particular exhibit?

MR. GAVIN: This particular exhibit.

MR. SMITH: I didn't understand the witness to say that.

THE WITNESS: I don't know al ut that particular exhibit.

(tr. 1678) THE COURT: Well, was it of the same edition or the same issue as this one?

THE WITNESS: I am sorry, sir. I would like to look

at that again.

MR. GAVIN: Let me hand it to him.

THE WITNESS: Well, I would say that we have published leaflets which contained information contained in this article about the Korean War, about this germ warfare, sir.

* * *

(tr. 1680) * * *

Q Now during the course of this school and in the presence of the defendant, did Bob Handman give any demonstrations?

A Yes, sir.

Q What was that, Mr. Childs?

A He demonstrated on jujitsu and also he demonstrated how to kill a person with a pencil.

Q Do you have a pencil with you?

A Yes, sir.

Q Can you describe to the Court and to the jury the demonstration that was given to you by Bob Handman in the presence of the defendant?

A Yes, sir.

Q Go ahead and do so.

A Well, what he showed us to do was to take our pencil, he said we might be able to use this on a picket line, said just take the pencil and place it simply in the palm of your (tr. 1681) hand so that the back will rest against the base of the thumb, and then we were to take it, and the person, and give a quick jab so that it would penetrate through here, and enter the heart, and then if we could not do that, we just take it and grab it at the base of the throat. (Demonstrated.)

Q Do you recall whether or not Scales had any comment to make about that?

A I don't recall him making any comment; no, sir.

MR. SMITH: Mr. Gavin, may I ask what day and what time this incident occurred?

MR. GAVIN: He said it was during the course of the school down—

Do you know what date that was, Mr. Childs?

THE WITNESS: I don't know what date, but I recall what time during the day; it was near noon and Scales was sitting practically in front of Handman when it took place.

* * *

(tr. 1692) * * *

Q Now, Mr. Childs, did you remain a Party member while you were at the University?

(tr. 1693) A I remained a Party member; yes, sir.

Q What were you told to do by the defendant or by others, instructors at Party Schools, in his presence?

MR. SMITH: When, Mr. Gavin?

BY MR. GAVIN:

Q At any time during your acquaintance with the defendant and association with him?

A With reference to what, sir?

Q What type of action did he advise you to take?

A Well, they were innumerable things that I was sup-

posed to do, in connection with my Communist Party membership, being that these things were assigned to me to do, being that I was a Communist Party member.

I recall that such things as, well, at one time I was told to get an apartment house in Winston-Salem so that I could, not—not an apartment house, just an apartment—so that I could store in there duplicating machines, mimeographing machines and literature for the Party in Winston-Salem.

MR. SMITH: May I ask when was he told that and by whom?

THE WITNESS: That was told to me by Hank Farash and Jerry Pearson in 1951.

MR. SMITH: Well, then I move to strike as not being responsive to Mr. Gavin's questions because I understood Mr. Gavin's question to be what was he told by the defend-
(tr. 1694) ant or by others in the defendant's presence.

THE COURT: What have you to say about that, Mr. Gavin?

MR. GAVIN: Was the defendant present at the time?

THE WITNESS: No, sir. I am sorry. I misunderstood your question.

BY MR. GAVIN:

Q Do you understand it now?
A Yes, sir.

Q All right, sir. Go ahead and answer my question, and I do not care to argue the objection or the motion to strike.
A At one time in Chapel Hill, I helped write a leaflet with Junius Scales on the Korean War.

* * *

(tr. 1697) * * *

Q. Mr. Childs, do you know what a colonizer is?

(tr. 1698) A Yes, sir.

Q What is it, please, sir?

A A colonizer is a person whom the Party sends into a particular area, an area in which the Party has a particular program it wants advanced.

This has been particularly used in connection with industrial concentration. The plan would be for a person to go into the area, get a job, if possible, in the industry in which they have an industrial concentration program, and develop into the community in the area in which they are sent.

Q Now, on July 24, 1952, what did the defendant: Scales, say to you about having a colonizer in the Winston-Salem area?

A Scales told me that he expected to have two colonizers soon in the Winston-Salem, in Winston-Salem.

* * *

REDIRECT EXAMINATION

(tr. 1762) * * *

Q Now, Mr. Smith was questioning you about this pencil demonstration that was given by Bob Handman at the Walnut Cove Party School?

A Yes, sir.

Q He inquired if that did not occur during a recreation period; is that correct?

A Yes, sir.

Q Well, did it occur during a recreation period?

A It did, sir.

Q Now will you state whether or not the recreation per-

iod was a regular scheduled activity at the Party School there and whether or not you were required to attend that (tr. 1763) recreation period and participate in it?

A The recreation period was explained to us to be a period in which we were to have group activities and all students were required to attend this recreation meetings.

Q Now were you and the other Party members at the Walnut Cove School given certain assignments?

A Yes, sir; we were.

Q What was the nature of these assignments, Mr. Childs?

A Those assignments related to the prospectives for the students there at the school; that is, what they were going supposed to do when they returned to, from—to the places from which they came.

Q Well, now later on when you had your reunion down in the picnic area at Duke University, was there a check-up made to determine whether or not these assignments had been carried out?

A Yes, sir; there was.

Q Was the defendant, Scales, there at that time?

A Yes, sir; I recall that, I think it was in reference to Betsy Tyree or later she married George Van Camp, that she had gone into industrial concentration following the directive of the Party School at Walnut Cove, and as a result of that Scales had been able to get two or three other people to go in the industry.

(tr. 1764) Q Now do you know whether that assignment had been given those two people at the Walnut Cove School?

A I recall, sir, that they were.

Q All right, sir.

Now, Mr. Childs, as a member of the Communist Party enrolled in that organization by the defendant, Scales, and receiving guidance and instructions from him, what activities did you take part in?

A May I use a note on that?

Q Yes, sir.

A I mean I have made—

MR. SMITH: If Your Honor please, I know this is the same question Mr. Gavin asked him this morning, and I don't know that anything came out during the cross-examination which would justify his going back over the same ground.

THE COURT: Is it repetition, Mr. Gavin?

MR. GAVIN: No, sir. I don't think so. I think the same question was asked on cross-examination by Mr. Smith and when the witness started to answer, Mr. Smith said, Was Mr. Scales there at the time? And he cut him off. That is what I objected to at that time, if Your Honor please.

THE COURT: All right.

(tr. 1765) MR. SMITH: Your Honor, my recollection is I asked him about some discussion at a meeting but I do recall specifically that Mr. Gavin asked him what his activities were during the entire period, and he gave some answer, I think; and this is exactly the same question. He has prepared some notes on it during the lunch—

MR. GAVIN: This is a question, if Your Honor please, that—

THE COURT: I will let it in.

MR. GAVIN: All right, sir.

THE WITNESS: This list was prepared, I prepared yesterday, sir, among the things which I had been instructed to do was by Hank Farash, I was told not to go in a Negro community because I'd been going to the Negro community as I had been previously instructed to do. He told me not to go in a Negro community because he did not want me to be exposed.

Also he told me not to call the Food, Tobacco and Agricultural Union Office there because again I might be exposed as being a Communist Party member.

Another thing was in connection with the printing—

tr. 1766) MR. SMITH: Mr. Gavin, are these things that the defendant instructed him to do? If not, I would object.

MR. GAVIN: Does Your Honor want to hear from me on that?

THE COURT: Yes.

MR. GAVIN: Your Honor, this is the question that has been asked before, I think of all Government witnesses. What activities did you take part in while you were in the Party. I recall that Mr. Taylor asked that question of Lautner. He asked that of Mrs. Hartle I know. She gave a long list of the activities that she was engaged in. I think under the Yates case, why, we are called upon to show activity. The question was phrased, I think, so that he might describe his activities as a member of the Party in which he was enrolled by the defendant, and receiving guidance from the defendant and instructions from him.

Now it is—

THE COURT: Under the directions of someone in the Party having authority to direct; is that your position?

MR. GAVIN: Yes, sir.

THE COURT: And as I understand it, the witness (tr. 1767) said these activities that he now is enumerating—

MR. GAVIN: Yes, sir.

THE COURT: —were pursued under the instruction and/or under the direction of Farash.

MR. GAVIN: That is correct.

THE COURT: Who was the organizer?

MR. GAVIN: Yes, sir.

THE COURT: I think that is admissible.

MR. GAVIN: And the defendant was the Chairman at that time.

BY MR. GAVIN:

Q All right, sir, go ahead.

A Warren Williams, who was with the City Committee of the Communist Party in Winston-Salem, told me to get the ingredients to make some mimeographing because Underground Party has to be able to make all types of things for itself. I was instructed to get the number of persons employed on day and night shifts at the Western Electric Plant.

It was suggested or discussed that I make plans for a collapsible mimeograph machine. It was told, I was told to

send letters to Senators, or a Senator and the President calling for leniency for the Rosenbergs, and in connection with these letters I was to use a false name. I should try to get the editor of a newspaper to ask for a visa to Russia.

I was to try to get students legislature to pass an anti-
(tr. 1768) McCarthy resolution. Contacted in Durham, told me to make an analyses of the Irwin Mills stockholders report for the Textile Workers Voice—I was also instructed to do research and write about the Wilmington riot.

I was told to get, by Hank, to get him a copy of our union contract. I was told not to sign a Clayde Brown petition. I was told to join a church where some people in my shop belonged in order to become closely associated with the people in the plant. I was told to struggle for Negro employment in Western Electric because they had to build a fire under some union representatives in that plant.

I was told to go to Camp Unity to meet more Progressives there. I was told to get an apartment to store literature and mimeograph machines for the Party in Winston-Salem. I was told to participate in the Martinsville Seven Vigil in Richmond. I attended the Washington Peace Crusade meeting in Washington.

I helped write and distribute leaflets in High Point, Winston-Salem and Durham and Chapel Hill. I helped organize. I worked with the union in Winston-Salem, the FTA union, and I helped write and publish the students Youth Bulletin, and there's many other things which I was told to do, sir.

Q You stated that you were instructed to write your Senators and Congressmen, I believe. There may have been others, I don't recall it. I wish you would state it, if so,
(tr. 1769) but you were to seek for, seek leniency for the

Rosenbergs. Now who were the Rosenbergs?

A The Rosenbergs were convicted for, I understand, giving atomic bomb secrets to the Russian Government. It was explained to me at this particular activity, that is, write letters, trying to get leniency for the Rosenbergs; we were told that we do not necessarily want the Rosenbergs freed, we just want them commuted to a life sentence, because some day we will be able to free them.

Q You know where you were told that, Mr. Childs?

A Yes, sir; I was told that at a Party meeting with Warren Williams who was on the City Committee in Winston-Salem.

Q Now what about, you mentioned some mimeograph activity or mimeograph machines. What security measures were you advised to take in regard to your mimeographing?

A Well, I recall on one leaflet which we, I went from Durham, or Chapel Hill, to Winston-Salem that—pardon me—what happened was I went to Winston-Salem with it to see if this leaflet could be printed there or mimeographed there because we did not have the facilities in Chapel Hill at that time, and when Warren Williams and I took, I recall, two mimeograph machines, one which would not work and one which worked fairly well, to Carl Korstadt's house on the High Point Highway, the Greensboro-High Point Highway, and there we put blankets up over the windows so (tr. 1770) people could not look in, and see what we were doing, and Warren used, wore white gloves, I believe—I wore some gloves, too, while we were mimeographing this thing.

He always mentioned that things had gotten so hot one time that they had buried a mimeograph machine, and they dug it up and took it to Raleigh where they had it cleaned up

and they told the place there that it was a church machine.

MR. SMITH: Mr. Gavin, will you ask the witness if the defendant was present?

MR. GAVIN: Was the defendant present at that time?

THE WITNESS: No, sir.

BY MR. GAVIN:

Q Now what precautions did you take, if any, to insure the use of a mimeograph machine and equipment in the future in the event of a crisis?

A Well, I recall that that came up in connection with getting the ingredients for this mimeographing. It was mentioned that one person had a flat-bed mimeograph machine which they could use which is easily transported and did not make any noise.

Q During this time that you have, that you were talking about the mimeograph activities, and of the other activities (tr. 1771) in which you are engaged, or were engaged, was the defendant, Scales, the Chairman of the Communist Party in North Carolina?

A It is my understanding he was the Chairman; yes, sir.

* * *

[fol. 443]

IN UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GREENSBORO DIVISION

Criminal No. 4320-G

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UNITED STATES OF AMERICA,

vs.

JUNIUS IRVING SCALES, Defendant.

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Before United States District Judge Hon. Albert V. Bryan, And a Jury.

**Transcript of Hearing—February 11 and 12, 1958**

WILLIAM GARFIELD CUMMINGS was called as a witness by counsel on behalf of the Government and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Gavin:

Q. Your name is William Garfield Cummings?
A. That is right.
Q. Where are you from?
A. I am from Toledo, Ohio.
Q. Where did you live prior to going to Toledo, Ohio?
A. Florence County, South Carolina.
Q. Now, Mr. Cummings, on or about December 8, 1949, did you have occasion to attend the Communist Party Midwest Regional School in Chicago?
A. I did.
Q. Did I ask you about December the 8th, 1945? Was that your answer?
[fol. 444] A. I did.
Q. Now, where was that school held?

A. It was held on Dennison Street, in Chicago, Illinois, over a Russian Co-op Restaurant.

Q. Were you a member of the Communist Party at that time?

A. I was.

Q. Did you join the Communist Party at the request of any governmental agency?

A. I did.

Q. What agency?

A. The Federal Bureau of Investigation.

Q. Now during the time you were enrolled in that school, did you make reports?

A. I did.

Q. To the, to what agency?

A. To the Federal Bureau of Investigation.

Q. Did those reports cover the activities at that school?

A. They did.

Q. Now would it help you in your testimony if you had those reports available before you to refresh your recollection?

A. It would.

Mr. Gavin: Your Honor, I will ask the Clerk to mark [fol. 445] these for identification. There are several of them. It will be No. 40-A, B, C, D, and if you will.

The Clerk: 40 and then 40-A.

Mr. Gavin: Wait. I want you to take them in the order that I have them.

The Clerk: Oh, pardon.

Mr. Gavin: Have them. There will be 40 and this will be 40-A.

(The Clerk so marked the reports to the F.B.I. as Government's Exhibits Nos. 40, 40-A, 40-B, 40-C, 40-D, 40-E, 40-F, 40-G and 40-H for identification.)

By Mr. Gavin:

Q. Now I hand you what has been marked for identification as Government's Exhibit 40-A, through 40-H, and ask you what that is.

A. These are the reports that I submitted to the Federal

Bureau of Investigation from the Chicago Training School in Midwest Training School, in Chicago in 1945.

Q. Now is that the original report, or is that a photostatic copy of the report?

A. This is a photostatic copy or facsimile.

Q. Do you recognize the handwriting there?

A. I do.

Q. Whose is it?

[fol. 446] A. It is mine.

Q. All right.

Mr. Cummings, how many students were in attendance at that school?

A. There was thirty-one students in attendance at that school.

Q. Will you tell the Court, please, something about the organization of the school?

A. Well, the school was organized by Mrs. Caroline Drews. The thirty-one students was broken down into three classes of eight, and one of seven. D-r-e-w-s.

Q. Now were you a member of one of those groups?

A. Yes, sir; I was.

Q. Who was the leader of that group?

A. The leader of the group that I was a member of was Gabe Kish.

Q. Do you know him?

A. I know Mr. Gabe Kish.

Q. What did he have to do with the Party, if you know?

A. Well, he was a member of the Communist Party in Pennsylvania, and he lived, he was a former coal miner and he lived in Pittsburgh, Pennsylvania, and he was on the Executive Committee of the Communist Party of the State of Pennsylvania. G-a-b-e, K-i-s-h.

Q. Now, would you tell us something about the organi-[fol. 447]-zation of your study courses, that is, the hours that you held classes?

A. Well, we was instructed by Miss Caroline Drews that we must be at class at nine o'clock in the morning, and there would be study in the groups from nine until noon, and at noon we'd have an hour's recess for lunch, and a walk, and then at one o'clock we would return to class, and we would

study from one until three, and from three until three-fifteen there would be a recess, and then there would be discussion from three-fifteen until six or seven o'clock in the afternoon or evening.

Q. Now what were some of the courses that were taught there at that school, the courses in which you were enrolled?

A. Well, the courses that I was enrolled in was No. 1, the Role of the Communist Party, Revisionism, Fight for Peace in Democracy, Fight for Jobs and Security, the Role of U.S.S.R. and Socialism, and the Role of the U.S.S.R. and the Negro Question.

Q. And who was the principal instructor?

A. The principal instructor of these classes was Mr. George Siskind.

Q. Now, if you will use your report, refresh your recollection, tell us what you were taught.

Mr. Smith: If Your Honor please, if the witness, Mr. Gavin, if the witness can possibly recall without using the [fol. 448] notes, I believe in line with Your Honor's suggestion regarding them, Mrs. Hartle, that she should do so if feasible, and now to recall, and has to use his recollection, that is another matter.

The Court: That is true. Let him refer to the notes only if it becomes necessary. If you feel that there is any necessity to assist your recollection by referring to the notes, you may do so, but unless you are required to make the reference, testify independently of the notes.

The Witness: Well, I feel that it will be necessary for me to make the references.

The Court: All right.

By Mr. Gavin:

Q. Now tell us what George Siskind taught you relating to the Role of the Communist Party in the United States.

Mr. Smith: If the Court please, would the record show that the witness is referring to his notes after saying that it would be necessary for him to do so in order to testify.

The Court: He said it would be necessary.

Mr. Smith: And would the record show that he is now using the notes after making such a statement.

[fol. 449] The Court: That he has them in his hand.

Mr. Smith: Yes.

The Witness: Mr. Siskind said that lecture, said that we, in his lecture, that we owe a debt to the working class and to pay this debt to the working class of America we must have a very strong Communist Party, and to this Communist Party must be the vanguard leadership of the working class of America. He also said that the working class should be made to understand that they are not a part of the duPonts, Fords or the Morgans, and said how can we do this. He said that we must have a strong, stable organization, Communist Organization in America to defeat the capitalist class.

He also said that it was a lot of elements that crept into the Communist Party during the revisionist period and he said that we must get rid of the stooges of the police force, the Federal Bureau of Investigation, Rankin's Committee, and all other forces that was against the Communist Organization, the working class.

By Mr. Gavin:

Q. State whether or not he told you what would have to be done with the capitalist system before this role could be [fol. 450] assumed.

A. He said before this role could be assumed that the capitalist system must be overthrown and he also said the only way that the capitalist system could be overthrown was by force and violence.

Q. Now did he compare, if he did, I wish you would say so first yes or no, did he compare the role of the Communist Party or the situation—strike that, please.

Did he compare the role of the Party in America today with the situation in Russia during the time of Lenin?

A. He did. He said in America today the Communist Party must work with the most militant workers in the shop, that they must be taught class consciousness, just as Lenin worked with the militant workers in Russia, and said that they must be taught that they cannot have peace

with the working class without a revolution and he said Lenin also taught the workers in Russia that it was necessary at times to throw bombs in the machinery and other things like that, and he said the American workers must be taught the same thing.

Q. Well, now, what did he say, if anything, regarding the time that this would take place?

A. Well, he didn't say what time that this would take place.

Q. All right. Now what about your class on Revisionism? Did George Siskind teach that?

[fol. 451] A. He did.

Q. Tell us what, if anything, he said about capitalism and socialism existing together.

A. Mr. Siskind said that Earl Browder wanted no part of revolution or revolutionary organization, he said that he compared Browder with Skuski; he said that he, that they both wanted socialism but they wanted no, did not want to have a revolutionary party in America, and he also said that the school, just a moment—the reason to organize this class was the Duclos article, the Political Affairs, the amendment to the resolutions, July Political Affairs, William Z. Foster's speech, Duclos article, September, Johnnie Williamson September Political Affairs, and the Frenchman, author, August Political Affairs.

Q. Well, was anything said in that class by George Siskind about full-time employment in the United States?

A. Mr. Siskind said that the capitalist class did not want full-time employment in America, said they only want to exploit the working class to get everything that they could out of the working class, and said the working class must be taught this and they must also be taught class consciousness in regard to the American capitalist class.

Q. Now who taught the course on Fight for Peace in Democracy?

A. Mr. Siskind taught the course on Fight for Peace in [fol. 452] Democracy.

Q. What did he say to you in that course about the stage at which this country had arrived?

A. Mr. Siskind said that America, said the last stage

of capitalism is imperialism, and he said America and Great Britain had arrived at that stage, that they were both imperialist countries.

Q. Well, go ahead. What else did he say about it?

A. He said because of the uneven development of capitalism, that Germany had threatened the world markets. He said that America and Great Britain was afraid to do, had to do something, was forced to do something about this, so they had to start, a war and redivide the world markets.

Q. Did he give you any solution for the uneven development of capitalism?

A. He said that the only solution to, for the uneven development of capitalism was the overthrow of the capitalist governments, and he said that the only way the capitalist government would be overthrown was by force and violence.

Q. What, if anything, did he say to you about the role of the Communist Party, Party in that endeavor?

A. He said that Great Britain and America had made concession after concession at Munich and other places, so Germany felt that they were strong enough to enslave the world, said we have already said that the last stage of [fol. 453] capitalism is imperialism, the next stage is Fascism, so we can see that the Americans had reached the last stages before the war, before Germany had a Fascist dictatorship; they had to have some place and people to start with, so it just was the minority group they started with, and we all know what happened, terror, terror, to the middle class.

At that time was forced out of the idea that they could be a part of big capitalists, and became the watchdog for them, the German Gestapo, police, and S.S. elite guard.

Q. What were you taught relative to the role of the Communist Party in organizing minority groups?

A. He said that, Mr. Siskind said that the Communist Party must organize the Negro people and the Jewish people and other minority groups to fight against the capitalist class, and he said it must be taught to them and hardened into their minds that they would not have socialism unless they fight for it.

Q. Now you stated that you had a course on the Fig for Jobs and Security. Who taught that course?

A. Mr. Siskind taught that course.

Q. Did he make any comparison with this country a Mexico in that?

A. He did.

Q. Go ahead and tell us what that comparison was.

A. He said in Mexico that the standard of living w [fol. 454] very low, and he said that in America if t working class didn't wake up and the Communist Par didn't give correct leadership to them, that the standa of living in America could be just as low as it was Mexico.

Q. Well, now what did he say that you could do to pr vent that?

A. Well, he said that the workers must be taught tha the only way that they could have peace was by overthro of the capitalist class, the American Government.

Q. Did he say anything to you or teach you anythin regarding your attitude towards the capitalist class?

A. He said that we must, we must, and we must teac the working class that they must hate the capitalist clas that they must fight the capitalist class, never a compromis and he also said that they fought in Russia, he said, at on time, said there was the blood ran in the streets in Russi and said before we would have peace with the capitali class in America, the blood would run in the streets i America.

Q. Now were you taught in that class by George Siskin as to how the capitalist class could be overthrown or woul be overthrown?

A. Said the capitalist class must be overthrown by forc and violence.

Q. State whether or not you were told about how man families control or rule America and what you were taugh [fol. 455] along that line.

A. Mr. Siskind said approximately sixty families con trolled eighty-five per cent of the national wealth o America.

Q. Now you also had a class on Socialism and the Rol of the U.S.S.R. Did George Siskind teach that course?

A. He did.

Q. Tell us what was taught in that course.

A. Mr. Siskind said that the U.S.S.R. in the last war, as we have already stated, led the fight and represented the democratic forces of the world. Said the workers of Europe knew that the Soviet society know that Soviet society are the only society that will solve the problem of the world today, that we have in some of the Balkan nations what we call equilibrium government, not capitalist, not Socialist government; we would have Socialist government in these countries, but America and Great Britain are playing power politics and forcing a partial capitalist government, the Socialists are fighting with aid of the Russian, with the aid of Russia to gain the upper hand and will emerge victorious in the near future, and Mr. Siskind also said that, I want to tell you this confidential, every one of the leaders in the Chinese Red Army were taught in the Soviet Union and today are being guided by the Soviet military heads.

Q. Now you also had a class on The Negro Question. [fol. 456] Who taught that class?

A. Mr. Siskind taught that class.

Q. Now state what he told you or taught you relative to the Negro question in the South.

A. George Siskind said that the Negro people in the Black Belt of the South will have to determine whether they want self-determination and a republic; says we are not in the position to say at this time, at this time, the National Committee of, have some work to do on this question.

During the revisionist period we gave up the struggle in, for the Negro people. We also gave up the Party work in the South, where the most of the Negro people are located. We must build the Party in the South and fight for what the Negro people want.

Q. Well, did he say anything to you about a Black Belt being established, or whether the Negroes would live in the South, or have to move out?

A. He further stated that we know the land are the most important thing in the South. We assume that the Negro in the Black Belt wants the land which they live on. The

land which they have sweated blood and toiled for, the big landlords, for the big landlords—we also know that we must fight the Negro people to have the right to vote, before we can hope to teach them how to vote, and who to vote for.

Q. I hand you what has been introduced in evidence as [fol. 457] Government's Exhibit 34-II. Do you know who that is?

A. That is Mr. George Siskind, the instructor of the Midwest Training School at Chicago, Illinois, in 1945.

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[fol. 458]

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WILLIAM GARFIELD CUMMINGS: was recalled as a witness by counsel on behalf of the Government and, having been previously duly sworn, was examined and testified as follows:

Recross examination.

By Mr. Smith:

Q. Mr. Cummings, I believe that during the time that you have been out of the courtroom, you were going to examine these reports that you made to see if you could find the words force and violence in there.

[fol. 459] A. That is right.

Q. Have you done so?

A. I have examined them.

Q. Can you point to the words force and violence?

A. I can't point to the words force and violence, but I have something here I'd like to read.

Q. Well, you cannot find the words force and violence?

A. Force and violence is not in the report, but it was certainly used constantly at the school by Mr. Siskind.

Q. And, yes, you said it was necessary, though, to use these reports in order for you to recall what was said?

A. That is right. That is right.

Q. All right. Now if in the course of your discussions with the attorneys for the Government, in preparing to

testify, was it, were the words force and violence used in discussions with you before you took the stand?

A. I don't quite follow your question.

Q. Well—

A. By whom do you mean?

Q. Either—well, by either of the Government attorneys that talked with you.

A. Not by the Government attorneys because they didn't attend that school. I did.

Q. But they talked with you before you testified yesterday?

[fol. 460] A. That's right. They talked with me.

Q. Do you say that during the entire discussion with you before you took the stand, that they never used the words force and violence?

A. They never talked in regards to force and violence. They asked me what I was taught at the school. They were not at the school. I was the one attended the school.

Q. Did they never ask you whether or not the words force and violence were used in the school?

A. I wouldn't recall them using it.

Q. You don't recall?

A. I can't recall them asking me that.

Q. That is all I want to ask the witness.

Mr. Gavin: Your Honor, I would just like to ask him just one or two questions.

By Mr. Gavin:

Q. You started to reading something from that report in explanation of Mr. Smith's question. I would like for you to go ahead with that.

Mr. Smith: Is it anything that you did not testify about yesterday?

The Witness: Well, I will say that I didn't testify about it completely and full.

Mr. Gavin: Just a minute.

If Your Honor please, he was going to explain an answer. [fol. 461] I think he was going to offer something in explanation to Mr. Smith's question, and Mr. Smith cut him off and I want to—

Mr. Smith: I would desire, had no desire to cut him off.

Mr. Gavin: I want him to have the opportunity to give his answer now. He said he would like to read something. What it is, I don't know, sir.

By Mr. Gavin:

Q. Go ahead.

A. The worker must hate the capitalist class and fight them. It will mean the spilling of blood. We will have streets of blood as they had in Russia. The workers must be organized so when this revolution comes, it must not be a failure. We must expose all bad elements in our Party and get rid of them. We must expose of them in the labor movement, also.

That is all.

Mr. Gavin: No further questions.

Mr. Smith: No questions.

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[fol. 462]

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7637.

JUNIUS IRVING SCALES, Appellant,

*versus*

UNITED STATES OF AMERICA, Appellee.

Appeal From the United States District Court for the Middle District of North Carolina, at Greensboro.

Argued June 13, 1958.

Before Soper and Haynsworth, Circuit Judges, and Barksdale, District Judge.

Telford Taylor (McNeill Smith; Bynum M. Hunter; Richmond G. Bernhardt, Jr.; Taylor, Scoll & Simon, and Smith, Moore, Smith, Schell & Hunter on brief) for Ap-

pellant, and Victor C. Woerheide, Attorney, Department of Justice, (J. Walter Yeagley, Acting Assistant Attorney General; James E. Holshouser, United States Attorney; Harold D. Koffsky, Phillip R. Monahan, Bruce [fol. 463] J. Teris and Jerome L. Avedon, Attorneys, Department of Justice, on brief) for Appellee.

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OPINION—Decided October 6, 1958

Soper, Circuit Judge:

This appeal is taken from a judgment of conviction under the membership clause of §2(a)(3) of the Smith Act of June 28, 1940, 54 Stat. 670, 671, which has been codified in the U. S. Code of Crimes and Criminal Procedure in the third paragraph of 18 U.S.C. §2385, as follows:

> "Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government[1] by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, * * *"

The indictment charges that during the entire period from January 1946 up to the date of the filing of the indictment on November 18, 1954, the Communist Party of the United States has been a society and group of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit; and that during the same period the defendant, Junius Irving Scales, in the Middle District of North Carolina and elsewhere, had been a mem- [fol. 464] ber of the Communist Party of the United States, well knowing that it was and is a society and group of persons who teach and advocate the overthrow and destruction

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[1] i.e., the Government of the United States or the government of any State, Territory, District or Possession thereof.

of the Government of the United States by force and violence as speedily as circumstances would permit; the defendant intending to bring about such overthrow by force and violence as speedily as circumstances would permit.

The defendant was first tried and convicted under this indictment in April 1955, and was sentenced to imprisonment for six years; and the judgment was affirmed by this Court in 227 F.2d 581. The Supreme Court of the United States granted certiorari and after argument and confession of error by the United States, under the later decision in *Jencks* v. *United States*, 353 U.S. 657, the judgment was reversed, 355 U.S. 1. At the new trial in February 1958, the jury returned a verdict of guilty and the defendant was sentenced a second time to imprisonment for six years.

The defendant's first point is a repetition of the contention, rejected by this Court on the first appeal, 227 F.2d 586-588, that the membership clause of the Smith Act is invalid on its face under the First and Fifth Amendments since it abridges freedom of speech and imputes guilt merely from association unaccompanied by unlawful conduct. It is admitted that the Supreme Court has upheld the validity of state statutes[2] which punish persons who organize or become members of a society or group formed to advocate or teach criminal anarchy; and also that in *Dennis* v. *United States*, 341 U.S. 494, the Supreme Court upheld the constitution-[fol. 465] ality of the advocacy and organization provisions of the Smith Act. But it is pointed out that in none of these cases were the defendants accused *only* of membership in the criminal organization, and that the statutes were held not to offend the First Amendment because they were designed to meet a clear and present danger to the state by prohibiting unlawful conduct in which the defendants had participated.

Specifically it is said that the *Dennis* decision was based on findings that the defendants were parties to an existing conspiracy which endangered the safety of the nation since it involved not merely the exposition of an idea but also the advocacy of unlawful action as well as personal intent on

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[2] *Gitlow* v. *New York*, 268 U.S. 652; *Burns* v. *United States*, 274 U.S. 328; *Whitney* v. *California*, 274 U.S. 357; *Fiske* v. *Kansas*, 274 U.S. 380; cf. *De Jonge* v. *Oregon*, 299 U.S. 253.

the part of the defendants to overthrow the government. Arguing that the membership clause of the Smith Act is constitutionally defective, the appellant seems to say that the clause does not require that the offender be engaged in any unlawful advocacy or party activity, either alone or in concert with other persons, but only that he be a member of the organization with knowledge of its purposes to overthrow the government by violence and hence "membership" as defined in the Act is merely the status and state of mind of a single individual and does not involve a clear and present danger to the state.

The argument is not persuasive since it fails to give proper weight either to the terms of the statute or to the *Dennis* decision in which §§(2)(a)(1) and (a)(3) and §(3) of the Act were specifically held to be constitutional, or to the decision in *United States* v. *Yates*, 354 U.S. 298, where the statute was interpreted and the *Dennis* decision was explained and approved. The terms of the membership clause are not satisfied merely by membership in a Communist group. The requirements are that the accused be a [fol. 466] member of a society or group who teach, advocate or encourage the overthrow of the Government of the United States by force or violence knowing the purposes of the society or group. In view of these provisions the Supreme Court in the *Dennis* case rejected the argument which is now presented to us in the following passage in its opinion, 341 U.S. 494, 502:

"The very language of the Smith Act negates the interpretation which petitioners would have us impose on that Act. It is directed at advocacy, not discussion. Thus, the trial judge properly charged the jury that they could not convict if they found that petitioners did 'no more than pursue peaceful studies and discussions or teaching and advocacy in the realm of ideas.' He further charged that it was not unlawful 'to conduct in an American college or university a course explaining the philosopical theories set forth in the books which have been placed in evidence.' Such a charge is in strict accord with the statutory language, and illustrates the meaning to be placed on those words. Con-

gress did not intend to eradicate the free discussion of political theories, to destroy the traditional rights of Americans to discuss and evaluate ideas without fear of governmental sanction. Rather Congress was concerned with the very kind of activity in which the evidence showed these petitioners engaged."

This view was developed and explained in *Yates* v. *United States*, 354 U.S. 298, where the Court said that it had long recognized the distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action, and that the legislative history of the Smith Act shows beyond all question that Congress was aware of this distinc- [fol. 467] tion and hence it could not be assumed that Congress chose to disregard a constitutional danger zone so clearly marked. The Court therefore found it unnecessary to decide the issue in terms of constitutional compulsion and held that it was the purpose of Congress to prohibit the advocacy and teaching of concrete action for the forcible overthrow of the Government and not of principles divorced from action. Showing that the decision in the *Dennis* case was in harmony with this interpretation, the Court said (pages 321 and 322):

"• • • The essence of the *Dennis* holding was that indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to 'action for the accomplishment' of forcible overthrow, to violence as 'a rule or principle of action,' and employing 'language of incitement,' *id.*, at 511-512, is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur. • • • As one of the concurring opinions in *Dennis* put it: 'Throughout our decisions there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken.' *Id.*, at 545. There is nothing in *Dennis* which makes that historic distinction obsolete."

The appellant seeks to distinguish these decisions from the pending case because in them the defendants were charged with *conspiracy* to violate the teaching and organization clauses of the statute, where as in the pending case the indictment charges the substantive offense of member-
[fol. 468] ship. The distinction is without significance on the issue of constitutionality. The Scales indictment charges a guilty knowledge of the illegal purposes of the organization and the specific intent on the part of the defendant to bring them about as speedily as circumstances will permit. "No one could conceive," said Chief Justice Vinson in *Dennis* v. *United States*, 341 U.S. at 501, "that it is not within the power of Congress to prohibit acts intended to overthrow the Government by force and violence." The question in any case is "whether the means [adopted by Congress] conflict with the First and Fifth Amendments to the Constitution." In that case it was expressly decided that Congress had the power as a proper means to the end to prohibit a conspiracy to overthrow the Government; and, as Judge Parker pointed out in the first appeal in this case, 227 F.2d at 587, "the membership clause of the statute is of course nothing more nor less than a statute denouncing and making criminal a conspiracy to overthrow the government by force and violence." It is too clear for argument that membership in an organization with knowledge of its purposes and an intent to make them effective is a joint rather than an individual undertaking which gathers its strength from an association or group of individuals inspired by a common purpose. The activities of such a group constitute a clear and present danger to the state and he who joins with open eyes becomes a party to all that he sees.

The appellant also renews the contention, rejected by this court on the first appeal, that the indictment under the membership clause states no punishable offense because of the provisions of §4(f) of the Internal Security Act of 1950, 64 Stat. 987, 50 U.S.C. 783(f). In §2 of this Act, 50 U.S.C. 781, Congress embodied the finding that the Communist movement in the United States is a rigidly and ruthlessly
[fol. 469] disciplined organization which seeks the overthrow of the Government of the United States by force and violence, and hence presents a clear and present danger to the existence of the United States and of free American in-

stitutions which requires the enactment of legislation de signed to prevent the accomplishment of this purpose. Ac cordingly, §4(a) of the statute, 50 U.S.C. 783, makes it a crime for any person knowingly to combine or conspire wit any other person to perform any act which would sub stantially contribute to the establishment of a totalitaria dictatorship in the United States under the domination o any foreign government, organization or individual; an §4(c) of the Act makes it unlawful for any agent of a for eign government, or any officer or member of the Com munist organization, knowingly to obtain or receive from any officer of the United States any information which shal have been classified by the President as affecting the secur ity of the United States. Sections 7 and 8 of the Act, 5 U.S.C. 786, 787, provide for compulsory registration of Communist organizations and the members thereof with the Attorney General under a criminal penalty for failure prescribed by §15 of the Act, 50 U.S.C. 794. The registration statements are required to contain the name and address of each individual who is an officer or member of the organization and in case the organization fails to register, it becomes the duty of any individual who is a member thereof to register with the Attorney General.

The legislative history of this statute shows that while it was under consideration Congress became aware that the registration provisions might be held unconstitutional as compelling self-incrimination under §4(a) of the Act making it a crime to conspire to establish a Communist organization in the United States and also as compelling self- [fol. 470] incrimination under the membership clause of the Smith Act.[3] On this account the bill was amended by the enactment of §4(f) of the statute, 50 U.S.C. 783(f), which provides that "neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute."

It is obvious that the provisions of the Internal Security Act which are aimed at membership in a Communist organization relate to the same subject as the membership clause

[3] S. Rep. No. 1385, 81st Cong. 2nd Sess., pp. 43-44; Cong. Rec. 13739, 13740; H. Rep. No. 3112, 81st Cong. 2nd Sess., 96 Cong. Rec. 15280.

of the Smith Act. Bearing this in mind, the defendant contends that the declaration in §4(f) of the Internal Security Act that membership in a Communist organization by any person shall not constitute per se a violation of subsection (a) of the statute, or a violation of any other criminal statute, effectively nullifies the membership clause of the Smith Act and bars a prosecution of the present case. It is said that the membership clause of the Smith Act must have been in the mind of Congress since there is no other criminal statute to which the last phrase of §4(f) could apply and, therefore, there is no ground for the prosecution of one whose only offense is membership in such an organization.

This contention was carefully considered in the opinion of Judge Parker on the first appeal in this case at 227 F.2d 589, where it was pointed out that the exemption from criminal prosecution under §4(f) is limited to membership per se and does not exempt from prosecution members of the Communist Party who hold membership in the organization with guilty knowledge of its criminal purpose to [fol. 471] bring about the violent overthrow of the Government. This becomes the more clear in the pending appeal by reason of the contention of the defendant based on the holding of the Supreme Court in the *Dennis* and *Yates* cases that mere membership in a Communist organization unaccompanied by advocacy and teaching of concrete action for the forcible overthrow of the Government is not a punishable offense within the membership clause. With these considerations in mind the meaning of the provision of §4(f) that membership in a Communist organization shall not constitute per se a violation of the Internal Security Act or any other criminal statute becomes obvious. Indeed, it is now settled that a statute forbidding mere membership in a Communist organization would violate the First Amendment. Section 4(f) of the Internal Security Act does not bar the present prosecution.

It is hardly worthwhile to discuss the contention of the defendant that the jury was unable to reach an independent and impartial verdict on the evidence because of the finding of Congress in §2 of the Internal Security Act that the Communist Party was an organization which seeks to overthrow the Government of the United States by force and violence. Every criminal statute is an expression of opinion by Con-

gress that certain conduct is meretricious and should be punished criminally. Such a statute is the Smith Act, and it would be difficult to find a juror who does not know that it was aimed primarily at the Communist organization. See *United States* v. *Lightfoot*, 228 F.2d 861, 870.

The defendant also contends that the membership clause, *as applied to the facts of this case*, is unconstitutional under the First, Fifth and Sixth Amendments. It is asserted that the evidence was not restricted, as it should have been, to the proof of concrete action by the Communist Party and [fol. 472] the defendant for the purpose of overthrowing the Government, but was allowed to range over a wide field so as to include activities in the form of free speech and free assembly protected by the First Amendment. It is also said that the defendant was not "informed of the nature and cause of the accusation" as required by the Sixth Amendment because the jury were instructed that the charge of membership in the indictment could be sustained only by proof that the defendant was an *active* member of the Party, so that a new element was introduced in the accusation which is not mentioned in the statute and is so vague that it presents no ascertainable standard of guilt; and hence the information clause of the Sixth Amendment and the due process clause of the Fifth Amendment were both violated.

We need not stop to give extended consideration to the last contention, for it is obvious that the defendant was not prejudiced by the instruction that in order to convict the jury must find that he was not only a member but an active member of the Party. This instruction was completely in harmony with the view expressed by the Supreme Court that the Smith Act contemplates not merely the advocacy of a theory of government but the advocacy of a concrete action of an unlawful character.

The other contentions obviously relate to the relevancy and sufficiency of the evidence to support the verdict and may be best considered after a statement of the evidence is set forth. It is well, however, to point out preliminarily that special duties with respect to the evidence are imposed upon the trial judge in a case of this kind. He must determine not only whether the evidence offered is relevant and is sufficient to prove the allegations of the indictment, as in the ordinary

case, but he must also determine whether the facts proved [fol. 473] constitute such a clear and present danger to the state as to overcome the prohibitions of the constitutional amendments and justify a conviction under the statute. In other words, the judge must decide, as a question of law, whether it is proper from a constitutional standpoint to apply the statute to the situation disclosed by the testimony. This was the position taken by the trial judge in the *Dennis* case, and it was approved not only in the illuminating discussion by Judge Learned Hand at 183 F.2d 215, 216, but also in the opinion of Chief Justice Vinson in the following words (341 U.S. at 513, 514, 515):

> "When facts are found that establish the violation of a statute, the protection against conviction afforded by the First Amendment is a matter of law. The doctrine that there must be a clear and present danger of a substantive evil that Congress has a right to prevent is a judicial rule to be applied as a matter of law by the courts. The guilt is established by proof of facts. Whether the First Amendment protects the activity which constitutes the violation of the statute must depend upon a judicial determination of the scope of the First Amendment applied to the circumstances of the case.
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> "The question in this case is whether the statute which the legislature has enacted may be constitutionally applied. In other words, the Court must examine judicially the application of the statute to the particular situation, to ascertain if the Constitution prohibits the conviction. We hold that the statute may be applied where there is a 'clear and present danger' of the substantive evil which the legislature had the right to pre- [fol. 474] vent. Bearing, as it does, the marks of a 'question of law,' the issue is properly one for the judge to decide."

## The Evidence

With these considerations in mind we now summarize the evidence that was adduced in the district court to sup-

port the allegations of the indictment: (1) that the Communist Party of the United States was at all times from 1946 until the finding of the indictment, a society which taught and advocated the overthrow of the United States by force and violence as speedily as circumstances would permit; and (2) that the defendant during this period was a member of the Party, well knowing its purposes and intending to effectuate them. The evidence relates to both categories and that which relates to the second not only shows the personal participation and activities of the defendant but supplements the general evidence as to the character and purposes of the Party.

Five ex-Communists gave testimony as to the character of the Party, two of whom, John Lautner and Barbara Hartle, were bona fide members and three, William Garfield Cummings, Obadiah Jones and Bellarmino J. Duran, became members in order to secure information for the Federal Bureau of Investigation.

Lautner was born in Hungary in 1902 but was brought to America at the age of sixteen months and lived in Youngstown, Ohio, until he was six, when he was taken back to Hungary. He there had a public school education and one and a half years at a teachers' college. He returned to Youngstown at the age of eighteen and became a naturalized citizen of the United States in 1926. He was a member and [fol. 475] a full-time employee of the Communist Party from 1929 to 1950, excepting the period of his military service between November 1942 and May 1945. In 1950 he was accused of being a Government agent and was expelled from the Party. At that time he was a leading member of the Party, having been chairman of the New York State Review Commission since 1947 and a member of the National Review Commission, the Party's top security board, since 1948. Since he had been a loyal member of the Party he was deeply disturbed by his expulsion and got in touch with the Federal Bureau of Investigation and volunteered to cooperate with the objectives of that organization in its investigation of the Party's activities. Since his expulsion he has testified as a Government witness in seventeen Smith Act cases and in numerous hearings before different Federal boards and departments, and during this period he received $125 a week plus travel expenses.

When he joined the Party in 1939 he became a student with twenty others from different parts of the country at a national training school sponsored by the Party's Hungarian National Bureau and carried on in the City of New York. He attended another training school in 1941 with six other students, all of whom were high Party officials, and from 1931 to 1945 he was himself a teacher at various Party schools in Canada as well as in New York and Cleveland.

During the period from 1930 to 1931 he was taught, and in turn taught his own classes, that the ultimate aim of the Party was to bring about a fundamental change in the economic, social and political structure of capitalism in the United States and that this change could not be achieved peaceably but could and would come as a result of force and violence in wresting power from the capitalist class in this [fol. 476] country. Later, in 1947 and 1948, he taught Marxism-Leninism at the functionary school classes in New York, teaching substantially the same doctrine as that above described. The purpose of the course was to explain the application of the "classic" theories of Marx, Engels, Lenin and Stalin to the present day. These writings taught revolutionary principles of action, which included the acceptance of reforms obtained by legal means in order to use them as a screen for violent activities of a revolutionary character.

In July 1945, the National Convention held in New York reconstituted the Party. It was chiefly concerned with putting an end to the "revisionist" policies of Earl Browder, formerly General Secretary of the Party, which aimed at a peaceful rather than a revolutionary road to Communism in this country. In order to effectuate the change, the Party leaders conducted classes for students of various grades, which included the use of an outline of nine "lessons" each covering a specific phase of Marxism-Leninism with reference to the Communist classics. These outlines contained passages which specifically called for the use of force in overthrowing the governments of capitalist nations and taught that the liberation of the oppressed classes was impossible without violent revolution and destruction of the apparatus of state power.

When Lautner was appointed Chairman of the New York State Review Commission as a successor to J. Peters, he acquired a key job in Communist Party security. His duties included cleansing the Party of deviationist tendencies. No dissent and no deviation was allowed. At the National Convention in 1948 he acted as security chief, seeing to it that not only the press but other curious outsiders were excluded and that the whereabouts of every delegate was [fol. 477] known at all times. After the convention he was assigned the job of lining up a series of hiding places and communication points for the New York organization's underground system and finding trustworthy members in whose custody sums of money up to $20,000 could be deposited.

On cross-examination it was brought out that in 1930 Lautner married a young woman, at the direction of the Party, in order to enable her to become a naturalized citizen. She was a stranger to him at the time and he never saw her again after the ceremony. Subsequently, acting on the Party's instructions, he secured a divorce and remarried, but in 1941 he got an annulment based on the false statement that he was a practicing Catholic and the further statement that his second wife had falsely represented that she would embrace the Catholic faith.

Mrs. Hartle was born in 1908 in Evans, Washington. She was graduated from Washington State College and later engaged in various occupations including work on a magazine, department store advertising and the operation of a lending library and gift shop. She became interested in the writings of Karl Marx in 1931 and joined the Socialist Party in Spokane. There she came in contact with Communists who were recruiting Party members amongst the Socialists. She was persuaded by them to join a Communist front organization called the Friends of the Soviet Union. By 1934 she held a Communist Party membership. She became secretary of a unit of ten members, was indoctrinated in the principles of Marxism-Leninism and was given various assignments in propaganda activities and the distribution of Communist educational material. She attended a Communist school in Seattle and in 1937 became the manager of a Communist book store which circulated Com-

[fol. 478] munist literature including pamphlets and newspapers. She attended a "Stalin" school in Seattle at the expense of the Party and studied various Marxist and Stalinist texts. From then on she became more and more interested and more and more prominent in the Party and was given various positions of responsibility. She was a full-time Party worker from 1940 until 1952 and held numerous offices, including membership on both the District Board and the District Committee of the Northwest District, an area which included Washington, Oregon and Idaho. In 1945 she succeeded to the number two job in the District, that of Organizational Secretary.

Mrs. Hartle played an important part in the activities of the Party in 1945, when a marked stiffening of Party doctrine took place. She was a delegate from the Northwest District to the emergency National Convention held in New York City in July of that year. Immediately prior to the convention a letter written by Jaeques Duclos, the French Communist chief, was published in this country first in the *New York World-Telegram* and later in various Party publications. It became the subject of anxious discussion in Party circles and the principles which it espoused were adopted. The substance of the letter was that, under the leadership of Earl Browder, the Communist Party of the United States had revised and departed from the doctrines of Marxism and Leninism and had given up the class struggle and the dictatorship of the proletariat as necessary to the achievement of the aims of Communism. A resolution to this effect was offered by the Resolutions Committee, of which Mrs. Hartle was a member, and was passed by the Convention. It was concluded that the Party should not pursue the peaceful road to Marxist socialism but the revolu-
[fol. 479] tionary road to upset the capi: list system in the interest of the working class.

In April 1946, Mrs. Hartle was assigned by the Northwest District to attend the National Training School at a summer resort near New York City. She attended its sessions for a period of two months with thirty other students, all of whom were officers and functionaries of the Party. The school was under the direction of one Jacob Mindel. It was part of a re-education program the purpose of which

was to train theoreticians and propagandists and to dispose of and to destroy the last remnant of "revisionism" of the Browder era. Emphasis was placed on the struggle between the capitalist and working class and the duty of the Communist Party to foment the class struggle by revolutionary tactics. The general aim was said to be a proletarian revolution to accomplish the dictatorship of the proletariat. The students were taught that a spontaneous struggle of the working class would never succeed and that in order for Marxist socialism to succeed a seizure and retention of power through a dictatorship was essential. It was taught that the United States was the foremost imperialist country in the world and was at the stage for proletarian revolution. The students were told that the members of the Communist Party must go amongst the workers and the masses and gain leadership of them by participating in their struggle. During these studies the classic texts of Marx, Engels, Lenin and other leaders were used. The students were told that the United States was a "bourgeois state" and "must be forcibly overthrown by the working class led by the Communist Party," and that the Communist Party must prepare the working classes for this seizure of power. Two examples of the revolutionary seizure of the state by force and violence were given; i.e., the Paris Commune, which [fol. 480] was described as the first attempt of the proletariat to storm the citadel of capitalism, which failed because the proletariat did not take sufficient steps to retain the power, and the 1917 Bolshevik Revolution in Russia. Mindel explained that imperialist wars could "only be ended by the civil war of the workers against their own government," with the Communist Party in the lead.

Mrs. Hartle herself used the instructions she received at this school when she later taught in the Party's training schools in the Northwest District between the years 1946 to 1950. In summarizing what she taught between 1945 and 1950, before she went underground, she said that the Party goal was the dictatorship of the proletariat which could only be obtained by forcible means and that force and violence would be used to seize control when the conditions were ripe for this event.

In 1950, Mrs. Hartle disappeared into the Party's underground apparatus at the direction of her superiors. For a little over two years she lived under an assumed name and moved frequently from one place to another in Washington and Oregon. The purpose of the underground was to conceal the identity of Party members in positions of importance so that in case leaders of the Party were arrested for violating the Smith Act or for other reasons the Party would not lack trained personnel ready and able to carry on. Mrs. Hartle welcomed the change from the strenuous work she had previously performed but began to question the importance of the work and to lose interest in effectuating the Party purposes. This marked the beginning of her break with the Party, but before this actually took place she was arrested by the FBI in September 1952, and in 1953 was indicted, tried and convicted for violating the Smith Act. [fol. 481] She was sentenced to five years imprisonment and ordered to pay a fine of $1000. She was released on bail pending appeal. During the trial she was notified by the Party that she was to be expelled for failing to follow Party discipline and for refusing to attend certain underground meetings. She agreed, however, to stand by the Party during the trial, and did so. On April 12, 1954, however, she made contact with the FBI and subsequently withdrew her appeal and was imprisoned for twenty and a half months until she was paroled on February 1, 1956. During her incarceration and subsequently, she testified before Congressional committees and for the Government in certain investigations into Communist activities and in criminal prosecutions brought under the Smith Act.

In line with this testimony was the evidence of William Garfield Cummings of Toledo, Ohio, who joined the Party at the request of the FBI in February 1944. He testified that in December 1945 he attended the Party's Mid-West Regional School at Chicago and was taught by George Siskind, the principal instructor, that the capitalist system must be overthrown and that this could be done only by force and violence. He was also taught that the United States was in the last "imperialistic" stage of capitalism and that the only solution for the working class was the

overthrow of the Government by force and violence, just as was done in the Bolshevik Revolution in Russia.

Obadiah Jones of St. Louis, Missouri, a Baptist minister and elevator operator, gave evidence as to the operation of a Communist Party training school which he attended in that city in 1947. The school was conducted under the guidance of George Siskind, the principal teacher, and Ralph Shaw, the chairman of the Party in Missouri. The students [fol. 482] were furnished with books containing the teachings of Marx, Lenin and Stalin and were taught that the only way that the Negro problem of the "Negro nation" in the Black Belt in this country could be solved was by a proletarian revolution led by the Communist Party whereby capitalism would be wiped out by violence and bloodshed. The students pledged themselves to work for the Party and to carry out the instructions of its leaders even though it meant to fight and to kill. Jones made reports of his connection with the school and the Party to the FBI and testified for the United States in Communist investigations and prosecutions.

Bellarmino Duran, a resident of Denver, Colorado, who was brought up in a household where Spanish was spoken, was educated in grade schools in Wyoming, Idaho and Colorado. In March 1951, he attended a special school in Los Angeles, California, which was established by the National Education Committee of the Communist Party of the United States and was known as the National School for Mexican Cadres. At that time he was a member of the Communist Party of the State of Colorado and was furnishing information to the FBI. The persons in charge of the school were Art Berry, District Organizer of the Party for the districts of Montana, Idaho, Colorado, Utah, New Mexico, Arizona and Texas; and Alberto Moreau from the Jefferson School in New York City. All of the students in the school spoke Spanish. At the beginning teaching was in this language and later English was used. Berry explained to the students that the school was established to enable Mexican cadres to study the theories of Marx and Lenin in relation to the liberation of the Negro, Puerto Rican and Mexican people of southwest United States. Moreau spoke in an introductory talk about the monopoly of capitalism

which had progressed into imperialism and the necessity of [fol. 483] teaching the masses that the system must be changed and that this could only be done through a proletarian revolution in which the workers in industry and agriculture would participate and in which the speaker visualized himself as carrying a gun against the capitalists. The students were taught that the proletarian revolution could not be brought about in a peaceful way but could only be accomplished by force and violence through which the state machinery of the bourgeoise, including the courts and the military establishments, would be smashed. He explained that the Communist Party would be the vanguard of the movement and after it was successful and the Party was in control the guns would be collected from the people so that they in turn might be controlled.

Duran was a member of the Party from 1948 until April 1955, when he was expelled upon the charge that he had taught force and violence in violation of the Constitution of the Communist Party. At that time he was asked to sign a note containing the false statement that the Communists did not teach the violent overthrow of the Government, but he refused to do so.

During his connection with the Communist Party he received compensation from the FBI for his services and subsequently testified in criminal prosecutions under the Smith Act and in other investigations on behalf of the Government.

## Evidence as to Scales

Ralph C. Clontz, Jr. testified at length in regard to the activities of the defendant Scales, of which he had first-hand knowledge from personal association. He also testi- [fol. 484] fied as to the activities and teachings of the Communist Party in general. He was the son of a Presbyterian minister and a resident of Charlotte, North Carolina. He was educated in the local schools and graduated from Davidson College in 1947, and from the Duke University Law School in 1950. After having completed three and a half years at Davidson, he enlisted in the army in 1942. When he was discharged in 1946 he held the rank of lieutenant and worked for military intelligence in Salzburg, Aus-

tria. In 1948, having become aware of Communist activity in North and South Carolina and fearing imminent war with Russia, he offered his services to military intelligence. They sent him to the FBI and he arranged with that organization to attempt to penetrate the Communist Party and find out what was going on. The FBI accepted his proposition but warned him that he would serve without compensation, and that if he got into trouble the Government would not recognize him and come to his aid.[4]

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[4] Clontz was not paid anything by the FBI for his activities during the year 1948 but paid all of his expenses, including travel, out of his own pocket. He was at that time enrolled at the Duke University Law School, but held full-time employment as the Division Sales Manager for Carolina Motor Club with upwards of twenty field representatives, i.e., salesmen, working under him. In 1949, his activity in the Party and at the law school made it necessary to cut down his salesmen to three. Around July 1949 he began to receive reimbursement from the Government for out-of-pocket expenses such as gasoline and the cost of Communist literature and other expenses necessary to carry on his investigation. In 1948 he had received $24.95 for services and expenses. At the end of 1949 he started receiving $20.00 a month from the Government. He was then married and had one child. The first of 1950 this monthly compensation was increased to $40.00 in addition to expenses; and when the Party sent him to the Jefferson School in New York in the summer of 1950 the Government paid him the equivalent of a first lieutenant's pay for the three-weeks period. When he returned to North Carolina his monthly payment was increased to $60.00 and remained at that until he went on full-time duty as a Government agent in January 1951. Thereafter he received a net sum of $450.00 a month plus expenses. He had, in the meantime, opened a law office, but he took a "cover job" in New York as a fraudulent claims inspector with the Association of Casualty and Surety Companies while he was acting as special agent for the Government. He received $300.00 a month from the Association but turned this over to the Government. He worked for the Association during the day and as a special agent for the Government at night, at least four nights a week. Other than his wife, no one knew of his Government connection. The salary of $450.00 lasted until February 3, 1953, when he quit Government service and commenced the full-time private practice of law. His association with the Government cost him money—his expenses in New York were $100.00 a month more than he received from the Government with the result that his savings of $2500 were wiped out.

[fol. 485] Thereupon, on September 9, 1948, he wrote to the defendant Scales telling him that he was a law student and was interested in Communism. Very shortly thereafter Scales sent him a large box filled with Communist literature and a letter inviting him to call at Scales' residence in Carrboro, North Carolina. Clontz called and had dinner with Scales and his wife. After dinner a discussion about Communism took place in which one McGirt, another Communist who came in later, participated. Scales explained that he had received a lot of Communist literature from the Party headquarters in New York. A later visit took place shortly before Christmas and at this time Clontz expressed the view that he had learned from his reading that Communism was a wonderful system and if the Party would educate people, they would vote the Communist Party into control of the Government. In a vigorous and extended reply, Scales said that this was completely impossible since the Government controlled all of the media of communication and education, as well as the Army, and that Communist success could only be accomplished by a militant force like that which had brought about the Bolshevik Revolution in Russia. Scales furnished Clontz with the works of Stalin, in which it was said that the Bolshevik Revolution could serve as a model of tactics in any country and that the oppressed classes could not be liberated without a violent revo-
[fol. 486] lution and the destruction of the state. The revolutionary strategy was based on the idea that the revolution could be accomplished by bringing two classes together in common cause: first, the working class or proletariat and second, the "Negro nation" located in the thirteen Southern States. This was the repeated statement of Scales on various occasions in 1949 and 1950. At one time he said that the situation in the United States was closely analogous to the situation in Russia at the time of the Bolshevik Revolution when the Communists were in the minority in the month of July but were nevertheless victorious in seizing control of the government in the following October. Scales did not expect a revolution in the United States very soon but thought that if a depression came there would be a bloody revolution.

In December 1949, Scales suggested that Clontz become a member of the Party and Clontz agreed that Scales submit his application to the Party leaders. Around about this time Clontz was given several pieces of literature, including an outline entitled "Thirty Years of the Communist Party U.S.A.," a copy of the Constitution of the Party, a Study Course of the Communist Party, the Working Class and Industrial Concentration. The first part of 1950 Scales informed Clontz that certain Communists at the university at Chapel Hill had formed a Karl Marx Study Club and later certain representatives of the Party from New York gave lectures to the club at the university. At these lectures it was stated that the Communists believed that a revolution of the kind that had taken place in the Soviet Union was a certainty and a necessity and that things were moving fast and the revolution would certainly come before long.

Clontz became a member-at-large of the Communist Party on or about January 17, 1950. He was not given any card [fol. 487] but was given a receipt for $1.50 for initiation and the first month's dues. Thereafter Scales gave Clontz private tutoring to prepare him for work in the Party. When asked when the revolution would come, Scales expressed the view that it would not come very soon but would come in time and that his fourteen month old daughter would marry a Communist in the United States. He felt that if a depression was imminent, it would greatly accelerate the coming of the revolution. During this period Clontz met Bernard Friedland, District Organizer for the Communist Party in the Carolinas, who questioned him about his background and his beliefs. Scales furnished Clontz with a number of Communist books for study in March 1950, including the "Foundations of Leninism," the "Problems of Leninism" by Stalin, and other works. In these works were a number of passages in which it was clearly stated that it was absurd to think that the revolution could be carried out peaceably without violence. It was said that the Soviet Union would not send troops to America to help in the revolution but would furnish experienced revolutionaries as instructors and supervisors.

In June 1950, Clontz told Scales that he would like to attend the summer session of the Communist school in New

York called "The Jefferson School of Social Science." Accordingly, Scales arranged for Clontz's admission and saw to it that he was provided with a scholarship to cover his expenses. In August 1950, during the three-week course, Clontz received special instructions from one Doxey Wilkerson, an instructor of the school and a member of the Party's National Committee. Wilkerson instructed Clontz that while some Party members had hoped that the Communists could gain power by peaceful means, it was necessary to "forget all this drivel," and that there was no longer any pretense [fol. 488] that the Communists could win by the people's vote and that a violent revolution was necessary, which would come about by combining the forces of the "Negro nation" and the working class within the Communist Party. Clontz was also instructed that the Party in the South had been partly underground for a long time and that plans were being made for operation on an individual basis in secret communications from New York to the rest of the country. Clontz was instructed to remain under cover when he returned to North Carolina and maintain contact with an undercover Communist club. As part of the concealment process, an official statement had been issued by the Education Commission of the Party disowning or disclaiming certain study outlines, texts and publications. This was done to establish a technicality for Communists on trial and their attorneys to make conviction more difficult. It would not, however, hamper the Party because the instructors could fill in orally the revolutionary part.

During the period in which Clontz was being instructed in the doctrines of the Communist Party the defendant Scales was engaged in similar activity with Government witnesses Otis R. Readis and Charles Benson Childs. Readis was a native of North Carolina employed by the Western Electric Company at Winston-Salem. Childs was a resident of High Point, North Carolina, a student a High Point College (1948-1950), an employee of the Western Electric Company at Winston-Salem (1951), and later a student at the University of North Carolina. Scales arranged for each of these men to attend Communist schools. He sent Readis to the Jefferson School in New York and Childs to a Party school for outstanding Party members from the Virginia

and Carolina District which was held on a farm near Winston-Salem. Scales himself was the director of this school. [fol. 489] In both of these schools the students were instructed in the principles of the Communist Party.

It was brought out in the testimony of these North Carolina witnesses that Scales occupied an important position in the Party as the chairman of the North and South Carolina District and as such reported regularly to the National Committee on the activities of the Party in his district, and saw to it that the directives of the National Committee were carried out in that area. These included the recruiting of members into the Party and the selection of promising Party members for further education in Communist doctrines. In December 1951, according to the testimony, he disappeared into the Communist underground. The evidence showed that he was completely familiar with the "Marx-Lenin classics" and that as a leader of the Communist Party he believed in and advocated the violent overthrow of the Government at the earliest feasible opportunity.

The evidence offered on behalf of the appellant Scales is stated as follows in the brief filed on his behalf in this court:

> "The appellant did not testify. For the defense, ten witnesses were called, nine of whom knew Scales during the period that he was a member of the Communist Party, and testified in support of his character and conduct. These included two clergymen, a radio station employee, a professor at the University of North Carolina, a Greensboro businessman, a textile mill worker, the wife of a Superior Court judge, and the appellant's mother and aunt. None of them had heard the appellant advocate force and violence, and several of them testified to Scales' statements and attitudes, heard by and known to them, which were inconsistent or incompatible with any such advocacy."

[fol. 490] From the testimony of members of his family it was learned that Scales was born in Greensboro, North Carolina, in 1920. After finishing his secondary education in local schools he was an undergraduate student at the University of North Carolina and held various jobs in Greens-

boro and High Point, North Carolina. In June 1941 he was married and in December of that year, shortly after the Japanese attacked Pearl Harbor, he enlisted in the Army Air Force. He attended the Officers Candidate School but was dropped before securing a commission. He went overseas in 1945 and was discharged in February 1946. He returned to the University of North Carolina and was graduated in February 1946, after which he undertook certain graduate work in history. In the autumn of that year he made a public announcement of his membership in the Communist Party.

Taking this evidence in the light most favorable to the prosecution, which must be done if the historic function of the jury is to be recognized, it is fair to say that, contrary to the appellant's contentions, the allegations of the indictment have been sustained. There is indeed no substantial conflict in the evidence since the only testimony of the defendant's bearing on the merits of the case, i.e., the testimony of certain of his neighbors that they never heard him advocate force and violence, does not preclude the finding that he really believed in the tenets of Communism and advocated them in dealing with actual or prospective Party members. Nor does this evidence on his behalf contradict in any way the description of the Communist Party and its activities given by the witnesses for the United States.

It was clearly shown that the Communist Party "is of sufficient size and cohesiveness, is sufficiently oriented to-
[fol. 491] wards action, and other circumstances are such as reasonably to justify apprehension that action will occur." (354 U.S. at 321). It is organized and staffed on a national scale with territorial divisions presided over and directed by district leaders. It is constantly engaged in the infiltration of the working classes and in recruiting members in various parts of the country. It holds annual conventions, attended by representative leaders from the various districts and policed for security reasons to limit the attendance to loyal members, which determines the policies to be pursued and the methods to be employed by Party members. It maintains an underground apparatus in which important Party members in danger of arrest or interference disappear under assumed names in order that the Party may

not lack leadership in times of emergency. It masks its purposes by false statements when it deems it expedient to do so.

It maintains training schools for officials and for novitiates in various parts of the country, in this case there is specific reference in the testimony to schools in New York, Canada, Seattle, Chicago, St. Louis and Los Angeles; and it distributes literature to members and prospective members. The true character and aim of the organization is shown by the teaching provided at these schools, as to which there is abundant uncontradicted testimony. At all of them, without exception, the students are taught that the United States is in the grip of a capitalistic society which oppresses and exploits the workers, and that this grip cannot be broken by peaceful and democratic means but only by the destruction of the institutions of the state by force and violence in a revolution of the workers led by the Communist Party in the vanguard. This doctrine is not held up to the students as a bare theory but as a basis for concrete action which must and will be taken whenever in the future a favorable [fol. 492] opportunity presents itself. This doctrine was reaffirmed by the action taken by the Party at its National Convention in 1945 when the peaceful policies advocated by Earl Browder were condemned and repudiated and the recommendations of Duclos, the leader of French Communism, were endorsed. On these facts the jury was entirely justified in reaching the conclusion that the elaborate structure of the Communist Party was set up for unlawful revolutionary concrete action accompanied by force and violence rather than for the mere advocacy of a theory of government.

The evidence in regard to Scales himself not only reinforces the conclusion as to the character of the Communist Party but justifies his conviction of charges contained in the indictment. We do not know what influences led him to become a member of the Party, for neither the United States nor the defendant offered any evidence on this point, but we do know that he was a prominent and active member of the organization, who served as chairman of the Carolina District of the Party and was active in recruiting suitable Party members amongst the university students in North

Carolina, and that he furnished them with Communist literature and advised and instructed as to the Party doctrines and arranged for their attendance at established Communist schools where formal classes of instruction were given. He himself was director of one of these schools and in harmony with their course of instruction, as above described. He himself in his contacts with new members consistently and repeatedly preached the revolutionary doctrine that, in the interest of the proletariat, the institutions of the state must be destroyed by force and violence as soon as it was reasonably possible to do so. He was constantly in touch with the national leaders of the organization and obeyed [fol. 493] their instruction that he should go underground under an assumed name.

We reach the conclusion of law, as did the trial judge, that the evidence in regard to the activities of the Communist Party and of Scales constituted proof of advocacy of concrete action, as distinguished from the promulgation of a theory, which created a clear and present danger of substantive evil beyond the protections of the First Amendment and within the right and power of Congress to prohibit. In our opinion, this conclusion is in accord with the approval given in *Yates* v. *United States*, 354 U.S. at 321, 323-324, to the essence of the *Dennis* holding in these words:

"• • • Although the jury's verdict, interpreted in light of the trial court's instructions, did not justify the conclusion that the defendants' advocacy was directed at, or created any danger of, immediate overthrow, it did establish that the advocacy was aimed at building up a seditious group and maintaining it in readiness for action at a propitious time. In such circumstances, said Chief Justice Vinson, the Government need not hold its hand 'until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required.' 341 U.S., at 509."

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"* * * Bearing in mind that *Dennis*, like all other Smith Act conspiracy cases thus far, including this one, [fol. 494] involved advocacy which had already taken place, and not advocacy still to occur, it is clear that in context the phrase just quoted referred to more than the basic agreement to advocate. 'The mere fact that [during the indictment period] petitioners' activities did not result in an attempt to overthrow the Government by force and violence is of course no answer to the fact that there was a group that was *ready to make the attempt*. The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come *for action*, coupled with . . . world conditions, . . . disposes of the contention that a conspiracy to advocate, as distinguished from the advocacy itself, cannot be constitutionally restrained, because it comprises only the preparation. It is the existence of the conspiracy which creates the danger. . . . If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added.' 341 U.S., at 510-511 (emphasis supplied)."

We find nothing at variance with these conclusions in the recent decisions of the Supreme Court in *Nowak* v. *United States*, 356 U.S.—and *Maisenberg* v. *United States*, 356 U.S. —. See *United States* v. *Silverman*, 2 Cir., 248 F.2d 671.

Admissibility of Evidence

It is contended that the judge erred in the admission of irrelevant evidence of an inflammatory character describing the activities of the Communist Party so that the defendant as a member of the Party was prejudiced in the eyes of the [fol. 495] jury. Three documents relating to the Korean War are singled out, which were published by the Communist Party or under its auspices. They were a publication entitled "Pre-Convention Discussion Bulletin" issued by the Communist Party of the United States; a copy of the Moscow newspaper "Trud"; and a pamphlet entitled "I Saw the Truth in Korea" by Allen Winnington, a correspondent of the *Daily Worker* in Peking. They were given to Clents

by Scales in 1950 and 1951, the first two in Washington, D. C. and the third in Durham, North Carolina. They accused the United States of launching and waging a criminal, reactionary, imperialistic war in Korea to enslave the North Korean people and deprive them of their independence. The last mentioned document described a small area in the Rangwuel Valley near Taejon, where it was said that the bodies of 7000 political prisoners were found in shallow graves who had been massacred under American supervision and in accordance with American instructions.

Motion for mistrial on the ground that the publications were calculated to inflame the passions of the jury was denied. The judge, however, cautioned the jury that they should weigh the evidence objectively and should not allow themselves to be excited or inflamed so as to impair their ability to try the case impartially as between the Government and the defendant.

In addition, the defendant complains of the admission in evidence of Communist activities relating to the existence of a Black Belt in southern United States where the Negro population was oppressed and denied the right of self-determination; and the general contention is also made that the judge should not have admitted evidence of Communist [fol. 496] doctrines and aims entirely distinct from Scales' knowledge of them.

In our opinion the evidence was properly received. That part to which the attack is chiefly directed consisted of documents handed by Scales to Clontz which were clearly intended to blacken the United States and stir up animosity against it and thus weaken its ability to defend itself should a revolution by attempted. It clearly served to corroborate the testimony in regard to Scales' activities in securing Party members and promoting the general objectives of the Party.

That part of the evidence which pertained to the activities of the Party with which he had no immediate connection was relevant, since it tended to prove the allegations of the indictment that the Communist Party of the United States was a group of persons who taught and advocated the overthrow of the Government of the United States by force and violence. That Scales had knowledge of these objectives is

shown by direct testimony as to his own teachings and activities on the Party's behalf. In respect to this contention, we said in denying the former appeal, 227 F.2d at 589:

> "* * * We think that this complaint is entirely without merit. The evidence as to the teachings carried on by the party and the documents used in the teachings was clearly competent to show the aims and purposes of the party; that which related to infiltration, subversion and the arousing of dissension had a direct bearing on the purpose to overthrow the government by force and violence when a favorable opportunity should present itself; * * *"

[fol. 497] Charge of the Court

The case was fairly submitted to the jury by the judge's charge. The jury were told that in order to convict the defendant they must find that the Communist Party teaches or advocates the overthrow of the Government of the United States by force and violence as speedily as circumstances will permit; that the defendant was a member of this Party who well knew of its teachings and purposes and that the defendant himself specifically intended to bring about such overthrow.

The jury were warned, however, that it is not criminal to hold or express the belief that the Government of the United States should be completely changed or to have such a change of government as a purpose or aim, or to express the opinion that the Government will at some time be overthrown by force and violence and that it is not criminal to criticize the Government and its policies, whether you agree or not with the truth or falsity of the criticism.

The jury were further told that it could not convict the defendant merely because he was a member of the Party no matter what its purposes and teachings are; and that teaching in the abstract what is meant by the aim to overthrow the Government by force and violence is not criminal, and that without being criminal the Communist Party could try to persuade its members to espouse the belief that the Government should be overthrown by force and violence as speedily as circumstances permit, since this is no more

than advocating an idea; but that if the Party went further and with the intent to overthrow the Government by force and violence advocated a principle of action which called on its members to take forcible and concrete action at some [fol. 498] propitious time to overthrow the Government by force and violence, and pressed that call in such a way as to incite its members to take concrete and forcible action for such overthrow, such activities were forbidden by the Smith Act; but those to whom the advocacy is addressed must be urged to do something now or in the future rather than merely to believe in something.

Summarizing this portion of the charge the Court said:

"It is not the abstract doctrine of overthrowing or destroying organized government by unlawful means which is denounced by the Smith Act, but rather the teaching and advocacy of action for the accomplishment of that purpose, by language reasonably and ordinarily calculated to incite persons to such action. Accordingly, you cannot find that the Communist Party of the United States was a society or group of persons who teach or advocate the overthrow or destruction of the Government of the United States by force and violence, unless you are satisfied beyond a reasonable doubt that the Party did in fact so teach and advocate, and did so with the intent that such teaching or advocacy be of a rule or principle of action, and by language reasonably and ordinarily calculated to incite persons to such action, all with intent to cause the overthrow or destruction of the Government of the United States by force or violence as speedily as circumstances would permit."

Finally, the jury were told that although the defendant admitted that he was a member of the Party it was not sufficient that he be simply a member. It must be more than a normal, passive, inactive or purely technical membership, [fol. 499] and that in determining whether he was an active or inactive member the jury must consider how much of his time and effort he devoted to the Party; "to be active he must have devoted all or a substantial part of his time and

efforts to the Party;" and that a specific intent on the part of the accused to bring about the overthrow of the Government as speedily as circumstances would permit was a necessary and indispensable requisite of the offense.

### The Jencks Statute

The defendant also contends that he was denied a fair trial because he was not permitted to inspect the entire reports and statements made to the Federal Bureau of Investigation before the trial by Government witnesses with respect to the subject matter of their subsequent testimony. During the trial the defendant called for the production of these reports and statements so that he might inspect them. They were accordingly produced but they were first delivered to the District Judge *in camera*, who excised therefrom such portions as do not relate to the subject matter of the testimony, and then turned them over to the defendant's attorney for his use. The defendant contends that this procedure did not conform with that laid down by the Supreme Court in *Jencks* v. *United States*, 353 U.S. 657. That case involved the conviction of the president of a labor union for false swearing in an affidavit, filed pursuant to §9(h) of the National Labor Relations Act, that he was not a member of the Communist Party. The principal witnesses for the Government were two Party members in the pay of the FBI, who testified concerning the Party activities of the defendant. On cross-examination they testified that during the course of their investigation they made reports to the FBI concerning the defendant's activities. Thereupon [fol. 500] the defendant's attorney moved the Court to produce these reports for inspection and use in cross-examination. The judge denied the motion and his action was affirmed on appeal (226 F.2d 540, 553) on the ground that no preliminary foundation was laid showing inconsistency between the contents of the reports and the testimony of the witnesses.

The Supreme Court reversed, holding that the defendant was not required to lay such a foundation because a sufficient foundation was established by the testimony of the witnesses that their reports related to the events and ac-

tivities covered by their testimony. The Court said that to require the accused first to show conflict between the reports and the testimony would be to deny the accused evidence relative and material to his defense, since in the absence of an admission of conflict he would be helpless to know or discover conflict without inspecting the reports; and hence a requirement of showing conflict would be incompatible with our standards for the administration of criminal justice in the United States. The Court further held that relevancy and materiality for the purposes of production and inspection with a view to use on cross-examination are established when the reports are shown to relate to the testimony of the witness. The Court condemned the practice of producing government documents to the trial judge for his determination of relevancy and materiality without hearing the accused and held that the defense must be entitled initially to see the reports to determine what use may be made of them; only thereafter may the trial judge determine the admissibility of the reports and the method to be employed for the elimination of immaterial or irrelevant parts. Conceding that the protection of vital national interests may militate against public disclosure of documents in the Government's possession, the Court held that [fol. 501] in a criminal action the choice lies with the Government and if it elects not to comply with an order to produce relevant statements of reports of witnesses in its possession touching the subject matter of their testimony, the criminal action must be dismissed.[5]

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[5] The Court said, 353 U.S. 668:

"• • • We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F.B.I., touching the events and activities as to which they testified at the trial. We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less.

"The practice of producing government documents to the trial judge for his determination of relevancy and materiality without

The procedure described in the *Jencks* case had not been generally recognized or followed in the Federal courts, nor had the practice been uniform. One accepted procedure required a showing of inconsistency between the pre-trial reports and the testimony of the witness as a basis for the production of the report. The Fifth Circuit, in its decision in the *Jencks* case, 226 F.2d 540, 552, and its earlier decision in *Shelton* v. *United States*, 205 F.2d 814, 815, found encouragement for this course in the decision of the Supreme Court in *Gordon* v. *United States*, 344 U.S. 414, 418-419, as did the First Circuit in its decision in *Scanlon* v. *United States*, 223 F.2d 382, 385-386. A different procedure was approved in the Second Circuit in the opinion of Judge Learned Hand in *United States* v. *Krulewitch*, 145 F.2d [fol. 502] 76, 78-79. This practice did not compel the defense to lay a preliminary foundation of inconsistency but required the delivery of the reports to the judge, if requested by the defendant, as soon as it appeared that they had been made by the witness and related to the subject matter of his testimony. It then became the duty of the judge to examine the statements *in camera* and if he should find something in them contradictory to the testimony of the witness, they were then delivered to the defendant for such use as he might desire.[6] It will be observed that in both of these procedures a showing of inconsistency had to be made, but the latter practice was the more helpful to the defendant since it relieved him of the difficulty of showing inconsistency in the reports before they were produced for examination.

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hearing the accused, is disapproved. Relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness. Only after inspection of the reports by the accused, must the trial judge determine admissibility—e.g., evidentiary questions of inconsistency, materiality and relevancy—of the contents and the method to be employed for the elimination of parts immaterial or irrelevant. See Gordon v. United States, 344 U.S. at 418."

[6] See also *United States* v. *Cohn*, 2 Cir., 145 F.2d 82, 92; *United States* v. *Ebeling*, 2 Cir., 146 F.2d 254, 256; *United States* v. *Lebron*, 222 F.2d 531; *Boehm* v. *United States*, 8 Cir., 123 F.2d 791, 807-808.

The *Jencks* decision gave rise to much discussion in legal circles[7] and very quickly led to the passage of the Act of Congress of September 2, 1957, 71 Stat. 595, whereby Chapter 223 of 18 U.S.C., entitled "Witnesses and Evidence," was amended by adding a new section 3500. The purpose of this statute, as shown by the Legislative History set out in 2 U.S. Code, Congressional and Administrative News, 85th Congress, First Session, 1957, page 1861 et seq., was to provide an exclusive procedure for handling demands for the production of statements and reports of witnesses in court so as to preserve the rights of defendants and at the same time to protect confidential information in the possession of the Government. An additional purpose was to correct what seemed to Congress to be a widespread misinterpretation [fol. 503] and popular misunderstanding of the opinion in the *Jencks* case, as shown by decisions referred to in the Legislative History, pages 1864-1868, which had led to the unnecessary disclosure of irrelevant government reports and interfered with the prosecution of criminal cases by the United States.

The new Act[8] provides in substance that no statement or report in the possession of the United States which was

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[7] 46 Georgetown L.J. 180, note; 67 Yale L.J. 674.

[8] 18 U.S.C. § 3500.

"§3500. Demands for production of statements and reports of witnesses

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

"(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not

made by a Government witness to an agent of the Government shall be the subject of discovery or inspection until the witness has testified on direct examination in the trial of the case; and that after he has testified the court, on motion of the defendant, shall order the United States to produce any statement of the witness in its possession which relates [fol. 504] to the subject matter of his testimony. If the United States claims that any such statement contains

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relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court *in camera*. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

"(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Pub. L. 85-269, Sept. 2, 1957, 71 Stat. 595."

matter which does no (sic) relate to the subject matter of the testimony, the court is required to order the United States to deliver the statement for the inspection of the court *in camera*, and thereupon the court is required to excise the irrelevant portions and to deliver the balance of the statement to the defendant for his use. If in such case the defendant is convicted, the entire text of the statement must be preserved by the United States and, in the event of an appeal, must be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. If the United States elects not to comply with an order of the court to deliver any such statement to the defendant, the court is required to strike the testimony of the witness from the record and proceed with the trial, [fol. 505] unless the court in its discretion determines that the interest of justice requires that a mistrial be declared.

The second trial of the pending case, now before us on appeal, took place after this statute was passed and the judge complied with its provisions when the defendant demanded the production of the reports of the Government witnesses for his inspection. The Government delivered the entire reports to the judge with the request that certain portions indicated therein should be excised by the judge *in camera* on the ground that they did not relate to the testimony of the witnesses. The judge complied with this request, examining all the reports and excising such portions as in his opinion did not relate to the testimony, and thereupon delivered the balance of the reports to the defendant. The defendant concedes that the judge complied with the statute but contends that the Act is unconstitutional since it did not fully comply with the requirements of due process laid down in the *Jencks* decision.

Through some misunderstanding as to the defendant's wishes the original unexcised reports of the Government witnesses were not sent to this court with the record on appeal but at the defendant's request the Government has now made them available to this court, as required by the statute, and they are now in our possession. We have examined them to determine the correctness of the rulings of the trial judge and we concur in his finding that the excised portions of the reports did not relate to the subject matter of the

testimony of the witnesses. It remains to pass on the contention of the defendant that the new Act is unconstitutional.

In our opinion the *Jencks* decision does not require this conclusion and we hold the Act to be valid. It must be borne [fol. 506] in mind in the first place that the position of the Government in the pending case is not the same as it was in *Jencks*, so that the Supreme Court has not yet passed on the specific question now before this court. In *Jencks* the Government objected to the production of any part of the reports on the ground that inconsistency with the testimony had not been shown, and the court sustained the objection. It was this ruling that the Supreme Court passed upon, holding that the entire reports should be produced for the inspection of the defendant's attorney so that he might offer the whole or such parts of them in evidence as he thought wise, whereupon it would become the duty of the trial judge to decide whether the reports should be admitted or certain parts thereof eliminated as immaterial or irrelevant. In other words, the Court did not pass upon the question, which arises under subsection (c) of the new statute, of what is to be done when the United States claims that a particular statement ordered to be produced contains some matter which does not relate to the subject matter of the testimony. In any event, it is our opinion that this statutory provision, whether it be regarded as an addition to or a change in the *Jencks* procedure, does not amount to a denial of the due process required by the Fifth Amendment but is merely a procedural regulation which preserves certain substantial rights of the accused and at the same time protects the Government files from the danger of unnecessary disclosure of its sources of information.

Most significant is the fact that the new statutory procedure does not deny the defendant access to any information which would be helpful to his case. Production of the reports for inspection does not depend upon the permission of Government custodians or the attorneys for the prosecution; and the determination of what portions of the re- [fol. 507] ports should be excised is not left to the Government but is entrusted to the impartial and experienced judgment not only of the trial judge but also the judges of

the appellate courts and the Justices of the Supreme Court themselves, if in their discretion they determine to review the case. The standard set by *Jencks*, 353 U.S. at 669, that justice re-requires (sic) no less than that the defense be entitled to see the reports to determine what use may be made of them is satisfied; and justice requires no more.

The defense is denied only the opportunity to be heard on the question whether the excised portions of the reports bear on the testimony of the witnesses; and this does not amount to a denial of due process. It does not interfere with any constitutional right to which the defendant is entitled but merely restricts his examination of the Government files which he desires to make, not because he has any reason to believe that they will yield anything helpful to his case but on the chance, which costs him nothing, that something will be turned up that will weaken the prosecution. In this situation it is clearly within the province of Congress to protect the right of the United States to withhold facts which it has gathered and to shield the sources of its information in the public interest so long as no pertinent information is withheld from the defendant. This can be done only by entrusting the determination of relevancy to someone other than the parties to the cause, and the method devised by Congress is obviously fair both to the Government and to the defendant and represents a reasonable exercise of Congressional power. In the *Jencks* decision the Supreme Court was not dealing with constitutional questions. It was exercising what is described in *McNabb* v. *United States*, 318 U.S. 332, 440, 441, "its supervisory authority over the administration of criminal justice in the United States * * * [to] by the establishment of civilized standards of procedure and evidence"; and Congress, by the passage of the interstitial legislation contained in §3500 was merely exercising its concurrent power in the same field to provide for a case that the Court did not envisage.

The conclusion that the provisions of the new statute were not violative of the constitutional rights of the defendant is supported by the decision of the Second Circuit in *United States* v. *Gandia, et al.*, decided May 15, 1958, 255 F.2d 454, where it was held that the defendants were not entitled to have their convictions vacated under 28 U.S.C. 2255

merely because the trial judge, having inspected the reports made by a Government witness and finding them not to be inconsistent with the witnesses testimony, denied the defense access to them. The court said that in the *Jencks* case the Supreme Court did not hold that constitutional considerations entitled defendants access to witnesses' reports but announced only an evidentiary rule to be followed in the trial of criminal cases in the United States courts. See also *United States* v. *Angelet*, 255 F.2d 383; *United States* v. *Spangelet*, 2 Cir., 27 L.W. 2063; *United States* v. *Procter & Gamble Co.*, 356 U.S. 672; *United States* v. *Consolidated Launderies* (sic) *Corp.*, S.D., N.Y., 159 Fed. Supp. 860.

## Impaneling of Grand Jury

Finally, the defendant makes the contention that the indictment is invalid because the grand jury was illegally impaneled. The method of selecting jurors was that the Deputy Clerk of the District Court and the Jury Commissioner sent out a number of form letters to reputable citizens requesting them to furnish a list of persons available for jury duty. The letters were sent, amongst others, to superintendents of [fol. 509] public schools, bank presidents, sheriffs, and the chairmen of the Republican and Democratic Parties in the counties in the district. In response the court officials received a list of names and addresses from which they eliminated those persons whom they deemed unfit on the basis of personal knowledge and those who appeared from the inspection of the list to be unsuitable. For example, those listed as physicians were stricken. The names were then placed in the jury box and when the time came to select the jury for a term of court the names of fifty-six persons were drawn at random from the box and summoned for jury service. The reverse side of the summons contained a questionnaire covering the qualifications of the jurors and when the returns came in they were checked to ascertain whether the persons summoned were qualified under the jury statute 18 U.S.C. §1861. When the prospective jurors appeared in answer to the summons, the names of fifty-six qualified persons were put in a hat from which nineteen were drawn by lot and they became the grand jury, the rest forming the

petit jury panel. The jurors were then questioned by the judge as to their payment of taxes for the previous two years and any litigation pending before the court, and whether they had any reason to be excused. A grand jury selected in this manner found the indictment on which the pending case was tried.

It does not appear from the evidence that any qualified person or class of persons was excluded from jury service or that any disqualified person served on the grand jury chosen in this case or that the defendant was in any way prejudiced by the procedure. It is, nevertheless, contended that the grand jury was illegally impaneled, since the panel did not consist of persons whose names were "publicly drawn from a box containing the names of not less than [fol. 510] three hundred qualified persons at the time of each drawing." It is said that the jury officials did not comply with the statute because they did not make sufficient investigation of the persons on the list before their names were put in the box and hence the prosecution must fail even though the defendant was not prejudiced, since the injury in such case affects the jury system and the community at large. See *Ballard* v. *United States*, 329 U.S. 187, 195; *Dow* v. *Carnegie-Illinois Steel Corp.*, 224 F.2d 414; *United States* v. *Dennis*, 2 Cir., 183 F.2d 201; *Walker* v. *United States*, 8 Cir., 93 F.2d 383; *Dunn* v. *United States*, 6 Cir., 238 F.2d 968; *United States* v. *Silverman*, D.Conn., 129 F.Supp. 496. A motion to dismiss the indictment on this ground was filed but it was denied by the judge who held that the selection of the grand jury did not involve any substantial deviation from the requirements of the statute and that in any event the defect had been waived by the failure of the defendant to raise the point within a reasonable time.

We think that the motion to dismiss was properly denied. It clearly appears that the defendant not only suffered no prejudice but that he waived the point by failing to comply with the provisions of Rule 12 of the Federal Rules of Criminal Procedure. Section (b)(2) of the rule provides that defenses and objections based on defects in the institution of the prosecution or in the indictment may be raised only by motion before trial and that the motion shall include all such defenses and objections then available to the defendant

and that the failure so to act constitutes a waiver thereof, although the court, for cause shown, may grant relief from waiver. The rule further provides that the motion shall be made before the plea is entered but the court may permit it to be made within a reasonable time thereafter. The de- [fol. 511] fendant did not comply with the provisions of this rule, as is shown by the following recital of facts.

He was indicted on November 18 and arraigned on December 7, 1954. At that time he declined court appointed counsel, secured a reduction in bail and a delay of the arraignment for one week to enable him to secure counsel of his own choosing. This period was subsequently extended to December 16. By that time the defendant had not secured an attorney and the court appointed counsel for the purposes of arraignment only. The defendant pleaded "not guilty," but notified the court that he reserved the right to make certain pre-trial motions, and the court granted a further delay until January 14, 1955. The defendant expressed complete satisfaction with the counsel who represented him on December 16.

On January 14, the defendant appeared with a New York attorney and requested an additional sixty days for the filing of motions and secured an order of the court permitting him to file such motions by February 18, with the right of the Government to reply on March 2, and a hearing of the motions on March 8. These dates were satisfactory to the defendant's attorney. On February 18, eight motions were filed but none of them attacked the grand jury. The hearing took place on March 8, at which the defendant was represented by a Washington attorney. By order of March 1 these motions were denied.

Subsequently, on March 15, the defendant filed the motion attacking the grand jury now under consideration. Evidence as to the method of selecting the jury was taken, a hearing was had and on April 15, as we have seen, the motion was denied. This ruling was entirely justified under [fol. 512] the terms of Rule 12, as interpreted by the authorities. The information on which the motion was based was at all times available to the defendant and yet he failed to take action despite liberal extensions of time. See *United States* v. *Silverman*, 129 F.Supp. 496, 513; *Nations* v. *United*

*States*, 8 Cir., 52 F.2d 97, 99; *Agnew* v. *United States*, 165 U.S. 36, 44; *United States* v. *Thompson*, 2 Cir., 144 F.2d 604; *Wright* v. *United States*, 8 Cir., 165 F.2d 405; *Notes of Advisory Committee*, fol. Rule 12, F.R. Crim. Pro., 18 U.S.C., p. 206.

Accordingly, the judgment of the District Court is

*Affirmed.*

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[fol. 514]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7637

---

JUNIUS IRVING SCALES, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

---

JUDGMENT—October 6, 1958

Appeal from the United States District Court
for the Middle District of North Carolina.

This Cause came on to be heard on the record from the ...ited States District Court for the Middle District of ...rth Carolina, and was argued by counsel.

On Consideration Whereof, It is now here ordered and ...judged by this Court that the judgment of the said Dis... Court appealed from, in this cause, be, and the same ...hereby, affirmed.

...ber 6, 1958.

Morris A. Soper, United States Circuit Judge.

...516] Clerk's Certificate to foregoing transcript omit... in printing.

[fol. 517]

SUPREME COURT OF THE UNITED STATES

No. 488, October Term, 1958

---

JUNIUS IRVING SCALES, Petitioner,

vs.

UNITED STATES OF AMERICA

---

ORDER ALLOWING CERTIORARI—December 15, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted and the case is assigned for argument immediately following No. 491.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter took no part in the consideration or decision of this application.

No. 488. Junius Irving Scales, petitioner, *v.* United States of America.

It is ordered that this case be set for reargument at the 1959 Term to be heard on Thursday, November 19, 1959. Counsel are requested to address themselves to the following questions among others:

"(1) Is the Membership Clause of the Smith Act, 18 U.S.C. § 2385, valid under the Constitution of the United States if it be interpreted to permit a conviction based only on proof that the accused was a member of a society, group or assembly of persons described in the Act knowing the purposes thereof?

"(2) If not, is the Membership Clause constitutionally valid if interpreted as also requiring proof that the membership was accompanied by a specific intent of the accused to accomplish those purposes as speedily as circumstances would permit? Does the Smith Act permissibly bear such an interpretation?

"(3) If the Membership Clause would not be constitutionally valid as interpreted under (1) or (2), would the clause be constitutionally valid if interpreted as requiring as an element of the crime proof that the accused was an 'active' member? Does the Smith Act permissibly bear such an interpretation? If not, and if the clause be valid without such element, does a constitutional application of the Membership Clause depend upon any such requirement, and if so was such a requirement properly applied by the courts in this case?

"(4) Whether the 'clear and present danger' doctrine, as interpreted by counsel, has application to the Membership Clause, either with respect to the accused or with respect to the 'society, group, or assembly of persons' described in the statute. If applicable, whether such doctrine was or can now be, properly applied in this case.

"(5) Is § 4(f) of the Internal Security Act, 50 USCA 780, a bar to the present prosecution? Counsel are requested to discuss the relevance of the registration provisions of that Act to this question."

Two hours are allotted to each side for oral argument.

Mr. Justice Clark:

There are some 13 indictments now pending in the courts awaiting our disposition of this case, and one being held here on petition for certiorari.[1] Involved is the validity of the clause in the Smith Act having to do with membership in the Communist Party.

The case first came here over three years ago. Certiorari was originally granted on March 26, 1956, 350 U.S. 992. After oral argument, the case was restored to the docket and ordered to be reargued, 353 U.S. 979. Prior to reargument, the Solicitor General filed a memorandum suggesting remand for a new trial under our intervening ruling in *Jencks* v. *United States*, 353 U.S. 657. This was done,

[1] Isaacs v. *United States*, No. 564 Misc., this Term.

355 U.S. 1. After affirmance of a second conviction, we again granted certiorari, 358 U.S. 917, and on April 29, 1959, heard oral argument for the second time.

The Court poses some questions ostensibly for the guidance of counsel at the third argument. None involves the "*Jencks question*," so there must be no doubt in the Court's mind on that issue. In fact all of the questions posed have been fairly covered by the two arguments already made by capable counsel. All the reargument does is cause inordinate delay. The case is as ready for disposition now as it will ever be, and we should not adjourn until it is handed down.

Much has been said of late of the law's delay, and criticism has been heaped on the courts for it. This case affords a likely Exhibit A. It looks as if Scales' case, like *Jarndyce* v. *Jarndyce*,[1] will go on forever, only for the petitioner to reach his remedy, as did Richard Carstone there, through disposition by the Lord.

LE COPY

Office Supreme Court, U.S.
FILED
NOV 3 1958
JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 817

JUNIUS IRVING SCALES,
*Petitioner,*

*v.*

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TAYLOR, SCOLL & SIMON
400 Madison Avenue
New York 17, N. Y.

SMITH, MOORE, SMITH,
SCHELL & HUNTER
Jefferson Standard Building
Greensboro, North Carolina
*Attorneys for Appellant*

TELFORD TAYLOR,
MCNEILL SMITH,
*Of Counsel.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

JUNIUS IRVING SCALES,
*Petitioner,*
*v.*
UNITED STATES OF AMERICA,
*Respondent.*

No. .....

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Junius Irving Scales, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on October 6, 1958.

### Opinion Below

The opinion of the court below (Appendix A, *infra*, pp. 31-81) has not yet been officially reported. The opinion of the court below affirming the judgment of conviction after petitioner's first trial under this indictment is reported at 227 F. 2d 581, and the opinion of this Court reversing that judgment is reported at 355 U. S. 1.

### Jurisdiction

The judgment of the Court of Appeals was entered on October 6, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

## Questions Presented

The Court of Appeals for the Fourth Circuit affirmed a judgment of the District Court of the United States for the Middle District of North Carolina, entered upon a jury verdict under an indictment, finding the petitioner guilty under the so-called "membership clause" of the Smith Act (Act of June 28, 1940, 18 U. S. C. 2385), proscribing membership in any society, group or assembly of persons who teach, advocate, or encourage the overthrow or destruction of the Government of the United States by force or violence, with knowledge that the purposes of the group of persons are such. It is not disputed that the petitioner was a member of the Communist Party during the three-year period prior to the indictment. The questions are:

1. Whether the "membership clause" of the Smith Act is unconstitutional (a) on its face, or (b) as applied to the facts of this case;

2. Whether the indictment charges an offense under the laws of the United States, in view of Section 4(f) of the Internal Security Act of 1950 (50 U. S. C. 783(f)), which provides that neither the holding of office nor membership in any Communist organization shall constitute *per se* a violation of that or any other criminal statute;

3. Whether the evidence was sufficient to support the judgment of conviction under the Smith Act in accordance with the standards prescribed in *Yates* v. *United States*, 354 U. S. 298 and other decisions of this Court; and

4. Whether, in four particular and important respects, petitioner was denied a fair trial.

## Statutes Involved

The relevant provisions of the Constitution of the United States, the Smith Act, the Internal Security Act of 1950, the Communist Control Act of 1954 (50 U. S. C. 841), the Act of September 2, 1957 (18 U. S. C. 3500), and the federal statutes governing the qualifications and empanelling of jurors (28 U. S. C. 1861, 1864) are set forth in Appendix B, *infra*, pp. 82-89.

## Statement

The petitioner has not been accused or convicted of helping to organize the Communist Party, of advocating the overthrow of the United States Government by force and violence, or of conspiring for such purposes. He has not been accused or convicted of any *act* whatever, other than being (or, more accurately, not ceasing to be) a member of the Communist Party.

The indictment (P. A. A2),[1] returned November 18, 1954, charges that the Communist Party is and has since January 1946 been a group of persons who advocated overthrowing the United States Government by force and violence; that Junius Irving Scales is and has since January 1946 been a member of the Communist Party; that he knew the Party to be a group of persons who advocated violent overthrow; and that he intended "to bring about such overthrow by force and violence as speedily as circumstances would permit."

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[1]References designated "P. A." are to the Appendix to petitioner's brief as appellant in the court below; those designated "G. A." are to the Appendix to the Government's brief below; those designated "Tr." are to the trial transcript; and those designated "G. Ex." are to the Government's exhibits.

The petitioner was first tried in April 1955. He was found guilty and sentenced to imprisonment for six years. That judgment was affirmed by the Court of Appeals for the Fourth Circuit in November 1955, 227 F. 2d 581. This Court granted certiorari, 350 U. S. 992, and heard argument on the constitutional and statutory questions in October 1956. In June 1957 this Court ordered the case restored to the docket for re-argument, 353 U. S. 979. On October 14, 1957, before the case was reached, the Court entered a further order, 355 U. S. 1, reversing the judgment on the authority of *Jencks* v. *United States*, 353 U. S. 657.[2]

After re-argument and denial of a motion to dismiss the indictment, the petitioner was tried again in February 1958. It was conceded by the prosecution, and the trial court so charged (P. A. A36), that Scales' conduct alleged as criminal had to be committed between November 18, 1951 and November 18, 1954, the three-year period preceding the indictment. It was acknowledged by Scales, and the trial judge so informed the jury (P. A. A41), that he was a member of the Communist Party within the statutory period.

The prosecution called as witnesses eight ex-Communists, of whom two were *bona fide* and six were Federal Bureau of Investigation informants. Five described Communist Party teachings and activities as known to them, but their testimony did not touch the appellant or Communist activities in the Carolinas. Three had known the appellant as a Party member in North Carolina.

In the former category, the most important witnesses were John Lautner and Barbara Hartle. Lautner, a paid

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[2]This Court made the same disposition of a companion case from the Court of Appeals for the Seventh Circuit, *United States* v. *Lightfoot*, 355 U. S. 2, reversing 228 F. 2d 861. In September the Solicitor General had filed with the Court a memorandum in both the *Scales* and *Lightfoot* cases, confessing error under the *Jencks* case.

consultant for the Department of Justice, had left the Communist Party in January 1950, nearly two years before the limitations period. He identified books and publications used in Communist Party schools, and testified that in such schools in New York City he was taught in 1930 and 1941, and he himself taught in 1947 and 1948, that the ultimate goal of the Communist Party in the United States was "to bring about a fundamental change in the economic, social and political structure of capitalism" (G. A. 105). He testified (G. A. 106) that this change "cannot be achieved peaceably" but "will come and can come as a result of force and violence on the part of wresting power [*sic*] from the capitalist class in this country."

Mrs. Hartle was a member of the Communist Party from 1933 to 1954. Between 1938 and 1946 she had attended two national Party conventions and a Party school in or near New York City, and she was a paid Party official in Seattle from 1940 to the middle of 1950. She testified that during that period she had taught and been taught that the ultimate goal of the Communist Party was "the dictatorship of the proletariat," and that this goal could only be attained "forcibly" (G. A. 230-31).

Both Lautner (G. A. 106-07) and Mrs. Hartle (G. A. 233-34) testified that they had taught and been taught that the Communist goal might be attained at an unspecified future time when the necessary "subjective and objective conditions" would be in existence. Three other witnesses who had joined the Communist Party as paid informants for the F. B. I. also testified about the teaching of the necessity of force and violence as a means of achieving the Party's objectives, as they had observed such teaching in Party schools in Chicago in 1945, in St. Louis in 1947, and in Los Angeles in March, 1951.

None of these five witnesses testified to any acquaintance or contact with or knowledge of the appellant, or to any

knowledge of his or of any Party activities in the Carolinas. Most of this testimony was received over defense objection on the grounds of incompetence, irrelevance, and lack of connection with the defendant. A motion to strike the testimony of all these witnesses was denied (Tr. 1828).

The prosecution's leading witness from North Carolina was one Clontz, who by pre-arrangement with the F. B. I. made contact with Scales in 1948 and joined the Communist Party in 1950. Two of Clontz' conversations with Scales (G. A. 246-47 and 263-64) were heavily relied on by the prosecution to show Scales' personal knowledge of the Party's advocacy of force and violence. These talks and all of Clontz' contacts with Scales took place before the statutory period of limitations, as the two did not meet again after September, 1951 (Tr. 1111 and 1128).

Clontz also identified several books and pamphlets received by him from Scales (P. A. A7-A14 and A18-A23; G. A. 310-13; Tr. 1794-1827; G. Exs. 64, 65, and 66) which condemned American conduct of the war in Korea. The prosecution offered these documents to show Communist Party incitement of action, in an effort to meet the requirement laid down by the Supreme Court in the *Yates* case, *supra*. This evidence, some of it highly inflammatory (*infra*, pp. 24-25), was admitted over objection, extracts were read to the jury, and the ensuing defense motion for a mistrial was denied (P. A. A18-A23).

The prosecution witnesses Reavis and Childs were also F. B. I. informants and members of the Communist Party in North Carolina. Childs testified about his attendance at a week-long Party school session held in August, 1952 near Winston-Salem, and described (G. A. 433-42) the various types of activity he was directed to engage in as a member of the Party, including writing letters to Senators, signing petitions, distributing leaflets, and obtaining the

"ingredients" for mimeographing. Neither Reavis nor Childs testified to any statement or act by Scales or in his presence indicating that Scales personally intended to overthrow the Government by force and violence, that he knew the Party's aims to be such, or that in fact they were such.

The petitioner did not testify. The defense called nine witnesses who knew Scales during the period that he was a member of the Communist Party, and testified in support of his character and conduct. These included two clergymen, a radio station employee, a professor at the University of North Carolina, a Greensboro businessman, a textile mill worker, the wife of a Superior Court judge, and the petitioner's mother and aunt. None of them had heard the petitioner advocate force and violence, and several of them testified to his statements and attitudes, heard by and known to them, which were inconsistent or incompatible with such advocacy.

In line with the *Yates* case, *supra*, the trial judge charged the jury (P. A. A38-A40) that the advocacy of force and violence punishable under the Smith Act is not mere advocacy of belief in violent overthrow of the Government, but must be advocacy of such a nature "as would reasonably and ordinarily be calculated to incite its [the Communist Party's] members to take concrete and forcible action for such overthrow . . ." However, the court refused to charge, as requested by the defense (P. A. A33-A34), that the Smith Act does not prohibit incitement of action specifically protected by the Constitution, such as speeches, leaflets, petitions to public officials, and other recognized means of public persuasion, unless those means are used to advocate the violent and forcible overthrow of the Government. Thus the jury was left free to consider, as evidence of unlawful incitement, the literature dealing with the Korean War and other evidence which was highly

prejudicial but wholly irrelevant to the issue of action-inciting advocacy of force and violence.

The jury found the petitioner guilty, and the trial judge again imposed a prison sentence of six years (P. A. A49).[3] Affirming the judgment of conviction, the Court of Appeals sustained the constitutionality and applicability of the membership clause (Appendix A, *infra*, pp. 33-40) on grounds similar to those invoked upon the previous appeal (227 F. 2d 581, 586-89). The court found no merit in the petitioner's other points, and rejected, expressly or *sub silentio*, his new contentions that the standard of proof of unlawful incitement prescribed in the *Yates* case had not been met, that the membership clause (assuming its intrinsic validity) had been unconstitutionally applied in this case, and that the indictment was fatally defective under the prosecution's new theory that the membership clause applies only to "active" membership.

**Reasons for Granting the Writ**

This case was the first under the "membership clause" to reach this Court. Two of the questions then presented—the intrinsic constitutionality of the clause and the effect of Section 4(f) of the Internal Security Act—are inherent in any prosecution under this provision of the Smith Act. In reviewing petitioner's first conviction the Court left these issues unresolved, and they are now presented not only in this petition but also in at least fourteen other cases pending in the lower federal courts.[4] The importance of

[3] Inasmuch as the maximum penalty for a conviction of conspiracy to violate the Smith Act was five years until the Act was amended in July 1956, Scales' sentence is heavier than has been imposed on any other Smith Act defendant.

[4] *United States* v. *Noto*, No. 25156 in the Court of Appeals for the Second Circuit; *United States* v. *Hellman*, pending in the Court of Appeals for the Ninth Circuit; *United States* v. *Lightfoot*, cal-

these questions of constitutional and federal statutory law is clear, as is the desirability that they be settled by this Court.

Furthermore, this case now comes here with new issues and old ones sharpened, as a result of the prosecution's attempt to meet the standards of essential proof under the Smith Act, as set forth by this Court in the *Yates* case. For this purpose the prosecution offered new "evidence," the admission of which was erroneous and highly prejudicial (especially in conjunction with the charge to the jury) and renders the membership clause plainly unconstitutional as applied in this case. For the same purpose, the prosecution sought to add to the offense new elements that are specified in neither the Smith Act nor the indictment. In spite of all these efforts, the proof wholly failed to meet the "action-inciting" requirement reiterated and applied in the *Yates* case.

1. *Under the First and Fifth Amendments the Membership Clause is Unconstitutional on its Face.* This case presents important non-constitutional questions the disposition of which, we believe, will in any event require a reversal. But if the Court should hold otherwise, or for some other reason should determine to pass on the constitutionality of the "membership" clause under which the petitioner was convicted, then the clause must be held invalid under the First and Fifth Amendments.

Since the Smith Act restricts the rights of free speech, press, and assembly safeguarded by the First Amendment,

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ordered for retrial as No. 54-CR262, N. D. Ill. E. D.; *United States* v. *Blumberg*, pending on motion for new trial, E. D. Pa.; *United States* v. *Russo*, D. Mass.; *United States* v. *Weiss*, N. D. Ill.; *United States* v. *Dennis*, No. C128/89; *United States* v. *Winter*, No. C128/98; *United States* v. *Gates*, No. C128/89; *United States* v. *Davis*, No. C128/93, and *United States* v. *Stachel, Hall, Foster*, and *Thompson*, all in the Southern District of New York.

this Court has been careful to specify the factors that are held to justify Congressional limitation of those rights. *Yates* v. *United States, supra; Dennis* v. *United States,* 341 U. S. 494. In both of these cases the defendants were charged with conspiracy to violate the advocacy and organizing paragraphs of the Smith Act, and it was in the power of a *conspiracy* that this Court, in the *Dennis* case, found a sufficiently "clear and present danger" to justify the statutory prohibition, saying (341 U. S. at 511): "It is the existence of the conspiracy which creates the danger."[5]

Another critical ingredient in the constitutional foundation of the Smith Act is *advocacy,* as distinguished from mere discussion. In the *Dennis* case the Court laid great emphasis on the constitutional importance of this distinction (341 U. S. at 502).[6] In the *Yates* case, avoiding (354 U. S. at 319) "a constitutional danger zone so clearly marked," the Court construed the Smith Act as limited to advocacy which incites the hearer to take action—"to *do* something, now or in the future, rather than merely to *believe* in something"—directed toward the violent overthrow of the government.

But these crucial elements of conspiracy and action-inciting advocacy are quite lacking in the charge against the petitioner. There is no accusation of conspiracy, or of concert of plan or act with any other person. It is not charged that the petitioner ever heard anyone advocate violent overthrow of the government, much less that he himself ever engaged in such advocacy. The indictment charges nothing more than a state of mind comprising knowledge

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[5]See also the late Justice Jackson's concurring opinion (341 U. S. at 577): "There is no constitutional right to 'gang up' on the Government."

[6]See also Justice Frankfurter's concurring opinion (341 U. S. at 545): "Throughout our decisions there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken."

and intent,[7] manifested in the external world by membership in the Communist Party. Such a charge wholly fails to satisfy the requirements stated in the *Dennis* case.

In essence, the membership clause seeks to hold a "member" of a group criminally liable for the group's "advocacy," whether or not the member participated in the advocacy. A co-conspirator or joint participant in a felony may be held liable for the acts of others, but it has not yet been held under our Constitution that "membership" is a form of association which warrants holding one member criminally responsible for the acts of others.[8] Such a statute is a flagrant abridgement of freedom of speech and assembly, denies due process of law by the unwarranted imputation of guilt, and is void by every criterion of the First and Fifth Amendments.[9]

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[7]In the *Dennis* case, the Court also specified (341 U. S. at 499-500) *personal intent* to overthrow the Government as a constitutionally essential element of the Smith Act, despite the fact that the Act expressly requires such intent only in the "distribution" paragraph, and not in the "advocacy" and "organizing" paragraphs (Appendix B, *infra*, pp. 82-83). The membership clause specifically requires "knowledge" of the group's violent purpose, but does not mention "intent." Therefore it is difficult to justify reading "intent" into the clause, which is thus rendered constitutionally deficient on this ground alone. An allegation of "intent" is included in the indictment, but of course this surplusage does not cure the defect. *Thornhill* v. *Alabama*, 310 U. S. 88.

[8]There is no constitutional support for the clause in *Bryant* v. *Zimmerman*, 278 U. S. 63, recently discussed in *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 465-66. The New York statute involved in the *Bryant* case does not suppress or penalize membership in the societies to which the law applies. It is a registration measure applicable to certain societies bound by secret oaths, and its sanctions are directed not at membership, but at failure to register.

[9]John Lord O'Brian, *National Security and Individual Freedom* (1955), at pp. 27-28:

> "The Smith Act of 1940 *made it unlawful* for any person to be or to become a member of or affiliate with any society, group, or assembly which teaches, advocates, or encourages the overthrow or destruction of any government in the United

The court below sustained the constitutionality of the membership clause by resorting to alchemy (Appendix A, *infra*, p. 37): "The membership clause is of course nothing more nor less than a statute denouncing and making criminal a conspiracy to overthrow the government by force and violence." But the clause is both more and less than, and very different from, a statute so described.[10] A conspiracy charge requires more than one conspirator;[11] the indictment here does not charge conspiracy and names no other conspirator. Under the federal conspiracy statute overt acts must be alleged; the indictment lists none. Conviction for conspiracy depends upon proof of an *agreement* among the conspirators to accomplish an unlawful act or employ unlawful means. See *United States* v. *Falcone*, 311 U. S. 205, 210; *Direct Sales Co.* v. *U. S.*, 319 U. S. 703, 713; *Mulcahy* v. *Regina*, L. R. 3 H. of L. 306, 317 (1868). But the charge against Scales covers no agreement or plot of any kind.

It is true that in the opinion of this Court in *Whitney* v. *California*, 274 U. S. 357, 371-72 the California criminal

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States by force or violence. The statutes, therefore, imported into our law the alien doctrine of guilt by association, which up to this time had been regarded as abhorrent and which had never been recognized either by the courts or by the Department of Justice, even during the perils and excitements of the First World War."

[10]Apart from the matters mentioned in the text, neither the membership clause nor any other part of the Smith Act proscribes "a conspiracy to overthrow the government" (an offense covered by a statute nearly a century old, now 18 U. S. C. 2384), but rather *advocacy* of governmental overthrow, whether orally or by the printed word. More important, the lower court's treatment of the membership clause renders it indistinguishable from the other provisions of the Smith Act, and therefore cannot possibly be sustained on elementary principles of statutory construction.

[11]See *United States* v. *Rabinowich*, 238 U. S. 78, 88; Pulton, *De Pace Regis et Regni* (London, 1615) pp. 232-33. Of course a single conspirator can be indicted, but the charge must involve one or more co-conspirators.

syndicalism statute, proscribing membership in or the organization of such groups, was described as partaking "of the nature of a criminal conspiracy." But the defendant in the *Whitney* case was not, as is the petitioner here, indicted for membership alone. In Mr. Justice Brandeis' concurring opinion (in which Mr. Justice Holmes joined) it is pointed out (274 U. S. at 379) that the defendant there had failed to challenge the California statute under the "clear and present danger" test, and that there was evidence linking her with "a conspiracy . . . to commit present serious crimes" quite distinct from advocacy. Justice Brandeis went on to point out the difference between a "membership" charge and a "conspiracy" charge, and indicated that, if the constitutional issue were properly raised, the California "membership" clause should be held void (274 U. S. at 372-73, 379):

> "The felony which the statute created is a crime very unlike the old felony of conspiracy or the old misdemeanor of unlawful assembly. The mere act of assisting in forming a society for teaching syndicalism, of becoming a member of it, or of assembling with others for that purpose is given the dynamic quality of crime. There is guilt although the society may not contemplate immediate promulgation of the doctrine. Thus the accused is to be punished, not for contempt, incitement or conspiracy, but for a step in preparation, which, if it threatens the public order at all, does so only remotely. The novelty in the prohibition introduced is that the statute aims, not at the practice of criminal syndicalism, nor even directly at the preaching of it, but at association with those who propose to preach it.
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> ". . . I am unable to assent to the suggestion in the opinion of the Court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment. . ."

The Government has long since conceded[12] that the membership clause, as written in the statute, can not be upheld, and has sought to salvage the clause by limiting its application to "active" or "high-level" membership in "tightly disciplined, quasi-military, deeply conspiratorial" organizations. How such a technique of statutory construction can be justified, how the clause so construed could withstand constitutional challenge for vagueness, or how an indictment lacking so many elements now deemed essential to the offense could survive, we do not know. Passing all this, the addition of "activity" as an element of the crime would not save the constitutionality of the clause; the five defendants whose acquittal was directed by this Court in the *Yates* case (354 U. S. at 330) had been exceedingly "active" in the Communist Party.

The prosecution's inescapable dilemma in this case is that the membership clause could be "assisted" to constitutionality only by reading into it elements—action-inciting advocacy, conspiracy—which would reduce it to surplusage indistinguishable from the rest of the Smith Act, and which would invalidate the indictment for failure to specify essential elements of the offense. Where, as here, there is no charge of unlawful activity or conspiracy, the statute can not be upheld. *Cf. Schware* v. *Board of Bar Examiners*, 353 U. S. 232; *Konigsberg* v. *State Bar*, 353 U. S. 252.

2. *Under the First, Fifth, and Sixth Amendments, the Membership Clause is Unconstitutional as Applied in this Case.* Certain documentary evidence received during petitioner's second trial was avowedly selected and offered by the prosecution (P. A. A10-A14) in order to meet the

[12]See the Solicitor-General's "Supplemental Memorandum for the United States on Reargument" in the *Scales* and *Lightfoot* cases, Nos. 3 and 4, October Term, 1957, p. 3, and his brief on the merits in the *Scales* case, No. 29, October Term, 1956, pp. 41-45.

"action-inciting" requirement laid down in the *Yates* case, which was decided while petitioner's first conviction was under review on certiorari. These documents, received over objection and read to the jury (P. A. A18-A23), were printed books and pamphlets embodying violent attacks (e.g, the extract quoted *infra*, pp. 24-25) on American policy and conduct of the fighting in Korea. The prosecution displayed these to the jury as specific proof of Communist Party incitement "to action" (P. A. A24).

But of course the *Yates* case standard of proof is not satisfied by proof of incitement to action of any kind, but only (354 U. S. at 312, 320) by proof of incitement to "concrete action for the forcible overthrow of government." Repellent as the documents in question may be, they are wholly unrelated to forcible overthrow. The court below thought the evidence relevant as showing (Appendix A, *infra*, p. 65) an intent "to blacken the United States and stir up animosity against it and thus weaken its ability to defend itself should a revolution be attempted." The grave dangers of such a view are easily perceptible. There are several issues dividing our country today, involving arguments and accusations that may well "blacken" and "stir up animosity against" the government. If the projection of such arguments in published form may now be taken as evidence of incitement to action for overthrowing the government by violence, there is little substance left in the First Amendment.

The defense requested a jury charge (P. A. A33-34) that the publication of unpopular opinions on issues of government policy does not, without more, constitute "action for the forcible overthrow of government." The prosecution objected, the court refused the instruction (Tr. 1926 and 1937), and the jury was thus left free under the charge to find that the ultimate fact required by the *Yates* case—action-inciting advocacy—had been established by

the Korean documents alone, in accordance with the prosecution's closing summation to the jury (P. A. A24).

If it be the Government's theory[13] that the use of speech, press, and assembly to oppose American involvement in Korea is lawful *per se*, but becomes evidence of crime if the auspices are those of the Communist Party, it is sufficient to say that this view was unanimously rejected by this Court in *De Jonge* v. *Oregon*, 299 U. S. 353, holding the Oregon criminal syndicalism law unconstitutional as applied to the charge in that case. No more can the Smith Act be constitutionally applied to punish membership in the Communist Party on the basis of publications such as the prosecution relied on in this case.[14]

As applied in this case, the membership clause is likewise unconstitutional under the Fifth and Sixth Amendments. At the prosecution's request and over defense objection[15] the court charged (P. A. A41) that for mem-

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[13]See P. A. A12-13, where prosecution counsel, referring to comparable documents offered (but excluded) for the same purpose, described them as "preparatory action . . . directed towards the ultimate aims of the Party." Of course, the five defendants acquitted in the *Yates* case had engaged in a great deal of such action (354 U. S. at 330), which nevertheless was held quite insufficient as proof of violation of the Smith Act.

[14]The book "I Saw the Truth in Korea" (G. Ex. 66, P. A. A20-A22) was singled out in the prosecution's summation as proof of incitement (P. A. A24) but, in addition to the Korean documents, an enormous amount of irrelevant and prejudicial evidence—particularly third-party declarations about matters remote from the petitioner in time and place—was received. Under so loose an evidentiary practice, the bounds of the Smith Act become so vague and far-reaching as plainly to trespass on both the First Amendment and the due process clause of the Fifth Amendment. *Winters* v. *New York*, 333 U. S. 507, 519-20.

[15]P. A. A47-48. In part the charge embodies the language suggested by the Solicitor-General in his "Supplemental Memorandum on Reargument" in No. 3 and 4, October Term 1957, pp. 6-7. Curiously enough the prosecution, having persuaded the trial judge to give the charge although he regarded it as out of place (Tr. 1934), subsequently informed the Court of Appeals (Govt. Brief p. 34) that this instruction was "unnecessary."

bership in the Communist Party to be criminal it must be "active," involving "all, or a substantial part" of petitioner's "time and efforts." This is fatally vague as a standard of guilt, under such cases as *United States* v. *Cohen Grocery Co.*, 255 U. S. 81. Furthermore, no charge of "activity" is specified in the indictment, which is thus rendered constitutionally defective, for want of essential allegations.[16] *United States* v. *Carll*, 105 U. S. 611; *Morisette* v. *U. S.*, 342 U. S. 246; *United States* v. *Lamont*, 18 F. R. D. 27 (S. D. N. Y.), aff'd. 236 F. 2d 312 (C. A. 2). The indictment was in substance amended, not only by the addition of the element of activity but also by the Court of Appeals' action in treating it as a conspiracy indictment (Appendix A, *infra*, p. 37), in violation of the rule long since laid down in *Ex parte Bain*, 121 U. S. 1.

3. *Section 4(f) of the Internal Security Act Bars the Prosecution of Communist Party Members and Officers under the Membership Clause.* In any prosecution of a Communist Party member under the "membership clause," the question of the effect of Section 4(f) of the Internal Security Act of 1950 is posed *in limine*. For if Section 4(f)

[16]The court below brushed off this argument on the ground that the petitioner was not prejudiced by the instruction. But the defense objected to the instruction as prejudicial (P. A. A47-48), and the Court of Appeals' own opinion is ample evidence of the confusion to which the instruction may give rise (Appendix A, *infra*, p. 41): "This instruction [i.e. on "active" membership] was completely in harmony with the view expressed by the Supreme Court that the Smith Act contemplates not merely the advocacy of a theory of government but the advocacy of concrete action of an unlawful character." Of course, the *Yates* case expressly holds (354 U. S. at 330-331) by its acquittal of the five defendants who were very active functionaries, that Party activity is not evidence of action-inciting advocacy. Furthermore, although a defective indictment which is not challenged prior to trial will be upheld unless the defendant was prejudiced, this is not true where (as here) the indictment is challenged as insufficient prior to trial. *Cf. Hagner* v. *United States*, 285 U. S. 427.

is given the effect that logical analysis requires and legislative history supports, it is a bar to such prosecutions.

Section 4(f) provides that neither Communist membership nor office-holding "shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute." The court below, relying on the phrase "per se," held (Appendix A, *infra*, pp. 39-40) that Section 4(f) does not apply to Communists "who hold membership in the organization with guilty knowledge of its criminal purpose to bring about the violent overthrow of the government." Such membership is not "mere" (i.e. "per se") but "with knowledge", and this added element removes it from the scope of Section 4(f).

The effect of this construction, obviously, is to limit Section 4(f) to Communists who do *not* have the stipulated knowledge. But this is wholly incompatable with the structure and purpose of the Internal Security Act in general and Section 4(f) in particular.

Section 2 of the Internal Security Act (50 U. S. C. 781) embodies a "Congressional finding" that (paragraphs 6 and 15) the Communist movement in the United States is "an organization . . . rigidly and ruthlessly disciplined . . . seeking to advance a movement when . . . overthrow of the Government of the United States by force and violence may seem possible of achievement . . ." Section 4(a) of the Internal Security Act makes it a crime "knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship . . . under the domination or control of any foreign government . . . organization . . . or . . . individual." Sections 7 and 8 of the Act (50 U. S. C. 786-87) provide for compulsory registration, under severe criminal penalties for failure, of Communist organizations and members.

Especially in view of the "Congressional finding" in Section 2, it is obvious that the registration provisions raise serious questions of self-incrimination for Communist members under Section 4(a). It was in order to deal with this problem that subsection (f) was added to Section 4, as the legislative history indisputably shows,[17]

Now, it is perfectly clear that, whatever may be held to be the legal effect of Section 4(f), its purpose would be entirely frustrated by confining its scope in accordance with the decision below in this case. For the lower court's construction would exclude from its coverage all Communists who know the objectives of the Communist organization as found by Congress in Section 2 of the Act. The inevitable consequence of the decision below is that Communists who know the Congressionally-found purpose of their organization are given no immunity under Section 4(f) and may plead the privilege against self-incrimination to avoid compliance with the registration provisions, which thus would be binding only on Communists who do *not* know their organization's purposes.

In short, the construction adopted below turns the entire statute into an absurdity. Plainly, membership "per se" means membership without other criminally significant acts or declarations, not membership without knowledge of the purposes of the group. No other interpretation accords with common sense and the plain purpose of the provision.[18]

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[17]The original Senate bill (S. 2311, 81st Cong., 1st Sess.) did not contain an immunity provision. The late John W. Davis raised the question of self-incrimination under Section 4(a) in a letter to the Senate Committee (Sen. Rep. No. 1365, 81st Cong., 2nd Sess., pp. 43-44). As a result of the Davis and other letters the Senate Committee added Section 4(f), providing that neither Communist membership nor office-holding should constitute a violation of Sections 4(a) or 4(c), the second of which proscribes the knowing receipt of classified information by Communist officers and members.

[18]*Cf. United States* v. *Ginn*, 222 F. 2d 289, at 290-91. It should also be noted that both Sections 4(a) and 4(c) make knowledge

Furthermore, the legislative history of Section 4(f)—ignored by the court below—shows that Congress specifically intended to protect Communist members and officers against prosecution under the membership clause of the Smith Act. As reported out by the Senate Committee, Section 4(f) related only to prosecutions under Sections 4(a) and 4(c) of the Internal Security Act. On the floor of the House of Representatives, this formulation was criticized by Representative Celler as inadequate, in that the protection was not extended to the membership clause of the Smith Act (96 Cong. Rec. 13739).[19] *Thereafter* the House adopted the amendment adding the words "or of any other criminal statute" (96 Cong. Rec. 13761), which was later included in the conference report and became part of the Act as passed into law. There is nothing but the membership clause to which the reference to "any other criminal statute" can apply.

Accordingly, the indictment does not charge the petitioner with any offense under the laws of the United States, and must be dismissed.

4. *The Evidence is Insufficient to Support the Conviction.* In the *Yates* case, this Court found (354 U. S. at 329) the evidence insufficient to establish that the Communist Party advocates forcible overthrow of the Government "in the sense of a call to action at some future time."

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an element of the crimes they proscribe, so that if Section 4(f) were construed to cover only membership without knowledge, it would be operative only with respect to persons who would not in any event be liable under Sections 4(a) and 4(c). This applies equally to the membership clause of the Smith Act, which punishes membership only if accompanied by knowledge, so that the phrase "of any other criminal statute" would likewise be robbed of all operative effect.

[19]The same point was made in the Senate Committee minority report (Sen. Rep. No. 2369, Part 2, 81st Cong. 2nd Sess., pp. 12-13) and in the debate on the Senate floor by Senators Kefauver and Humphrey (96 Cong. Rec. 14479, 15198).

The Communist Party therefore could not be treated as (*ibid.*) "the nexus between these petitioners and the conspiracy charged." However, inasmuch as the *Yates* defendants were charged with conspiracy to violate the advocacy and organizing paragraphs of the Smith Act—i.e. with individual activity in combination with others—the Court then scrutinized the record (354 U. S. at 331-32) to see whether there was evidence of criminal conduct.

But under the membership clause there is no charge of violating or conspiring to violate the other provisions of the Smith Act. Since the only charge is knowing membership in a group whereof the purposes are to advocate forcible overthrow, the group (here the Communist Party) is a necessary nexus between the defendant and the crime charged. Unless it be proved that the Communist Party is such a group, the conviction cannot be sustained. In other words, in a Communist Party membership clause case the prosecution must establish what, as this Court determined, it failed to establish in the *Yates* case.

At the close of the prosecution's case, the appellant moved (P. A. A18) for a judgment of acquittal, and in support thereof filed a memorandum (P. A. A25-A32) embodying an item-by-item comparison of the prosecution's evidence with the evidence in the *Yates* case found insufficient by this Court. As the memorandum shows, the evidence in the two cases is substantially identical. Every important strand of proof about the Communist Party that was presented at petitioner's second trial had also been presented in the *Yates* trial.

This similarity is hardly surprising, for both the documents and the witnesses, of which the record in this case is the product, are veterans of numerous prior Smith Act trials. The basic Communist "classical" writings by Marx, Lenin, Stalin, and others, after all, could hardly be improved

on by the Government's later efforts, however zealous.[20] Of the prosecution's principal witnesses on the aims of the Party, Lautner had testified in seventeen Smith Act trials including *Yates* (Tr. 450-51), and Mrs. Hartle had testified on the subject of Communism in nine prior cases (Tr. 893) and Cummings in six (Tr. 947-48). Without a remarkable refreshment of recollection, the prosecution witnesses' testimony about the Communist Party was bound to parallel, as it did, the earlier testimony on that subject in the *Yates* case.[21]

. . . .

The prosecution sought to escape this dilemma and give the record new color in two ways. The first was by offering the Korean and other comparable documents and testimony already discussed (*supra*, pp. 14-16). The second was to call a greater number of witnesses than was called in the first trial, in order to show a uniform pattern of indoctrination at the several Party schools attended by the witnesses. However, this extensive testimony added nothing beyond what was before this Court in the *Yates* case, in which there was abundant testimony that the Communist Party schools, as part of a nationwide campaign for re-education of Party members after 1945, and in order to stamp out Earl Browder's "revisionism," taught the inevitability of force and violence in the achievement of Socialism, the dictatorship of the proletariat, the class struggle, and other such elements of "Marxist-Leninist doctrine" (P. A. A29).

As this Court observed in the *Yates* case (354 U. S. at 329), such testimony "might have been well enough towards making out the Government's case if advocacy of the abstract doctrine of forcible overthrow satisfied the Smith

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[20]The prosecution's basic documentary proof about the purposes of the Communist Party was in fact substantially the same in both the *Yates* case and the present case (P. A. A31).

[21]The duplicating items and strands of proof are listed in the memorandum in support of the motion for acquittal (P. A. A26-A30).

Act," but it still left the record "strikingly deficient" in terms of action-inciting advocacy. And it would indeed be a strange outcome if the Communist Party should be found to be an action-inciting organization in Greensboro, on the basis of evidence substantially similar to that which this Court held insufficient in Los Angeles.

The Court of Appeals wholly failed to deal with this problem; there is not a word in its opinion about the evidence reviewed in the *Yates* case. There is no specification of evidence about the Communist Party, given at petitioner's second trial, which might be deemed to meet the crucial deficiencies noted by this Court in the *Yates* case.[22] The opinion below recites the evidence at length (Appendix A, *infra*, pp. 43-63), but the conclusory summation (*id.*, pp. 59-63) contains absolutely nothing that was not equally present and relied upon by the prosecution in the *Yates* case.

The lower court's treatment of the evidence received on the issues of petitioner's *knowledge* of the Party's aims, and his personal *intent* to overthrow the government by force, is equally unsatisfactory. Reliance is placed (Appendix A, *infra*, pp. 54-56) on statements made by the petitioner in 1949 and 1950— long prior to the limitations—about the impossibility of achieving Communism by educational means without accompanying violence. But these statements strikingly resemble those held insufficient by this Court, as "merely the expression of opinions about future events, rather than as advocacy of violent action for the overthrow of government,"[23] in *Nowak* v. *United States*,

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[22]In justice to the court below, it should be noted that the prosecution gave no help on this point. The Government's brief (p. 39, note 19) simply declined "to undertake the formidable task of comparing . . . the various 'strands of proof' in the two cases" and declared that no such analysis is "required in this case."

[23]The lack of "action-inciting" quality in petitioner's observations relied on below is underscored by his reply, when asked about the imminence of the revolution, that (Appendix A, *infra*, p. 56) "his fourteen month old daughter would marry a Communist in the United States."

356 U. S. 660, 665-68, and *Maisenberg* v. *United States*, 356 U. S. 670, 672-73; see also *United States* v. *Silverman*, 248 F. 2d 671, 678 (C. A. 2).

Otherwise, the court below relied principally (Appendix A, *infra*, pp. 61-62) on petitioner's general Party activities. Of course, under the *Yates* case this sort of evidence is quite insufficient as proof of petitioner's guilty knowledge or intent, and cannot sustain his conviction under the Smith Act.

5. *Petitioner Was Denied a Fair Trial.* Petitioner's indictment and trial were vitiated by numerous prejudicial errors; of which four are of such general importance as to warrant review and correction by this Court.

(A) There was highly prejudicial error in the admission of incompetent, irrelevant, remote and inflammatory evidence. The trial was conducted on the apparent assumption that anything ever said or written by any member of the Communist Party was admissible against the petitioner to prove the Party's unlawful aims.[24]

The three documents (G. Exs. 64, 65, and 66) relating to the Korean War were, beyond question, inflammatory and exceedingly prejudicial to the defendant (P. A. A18-A24). The prosecution did everything possible to exploit their emotional effect (P. A. A22-A24). The documents had no conceivable bearing on the issues in the case; nevertheless the trial judge permitted the prosecution to read to the jury such matter as the following (P. A. A21-A22):

> "As is often the case in Korea, the facts were worse than the rumor for at that time most Koreans were not acclimatized to the diabolical ruthlessness

[24]The defense objected to the admission of such evidence from the outset of the trial (Tr. 82-114, 115, 144, 159, and 161), but generally without success.

of the Americans and their puppets. Try to imagine Rangwul Valley. . . In the middle you can walk safely, though your shoes may roll on American cartridge cases, but at the side you must be careful for the rest of the valley is a thin crust of earth covering corpses of more than seven thousand men and women.

"One of the party with me stepped through nearly to his hip in rotting human tissue. Every few feet there is a fissure in the topsoil through which you can see into a gradual sinking mass of flesh and bone. The smell is something tangible that seeps into your throat. For days after I could taste the smell. All along the great death pit, waxy dead hands and feet, knees, elbows, twisted faces and heads burst open by bullets, stick through the soil.

"When I read of Nazi murder camps at Belsen and Buchenwald I tried to imagine what they were like. Now I know I failed . . .

"American officers, with officers of the puppet army, went in jeeps on each day and supervised the butchery. . . .

"This was only one of the massacres carried out at American instructions."

There was a vast amount of other irrelevant testimony, not so gruesome but equally prejudicial. For example, Government witnesses described Communist Party teachings concerning a so-called "Black Belt" of concentrated Negro population, throughout which the Negroes should be regarded as an oppressed "nation" with the right of self-determination. The prosecution made no effort to relate this testimony to the advocacy of force and violence, or to show that the "doctrine" of the "Black Belt" was ever put forward in an action-inciting way.[25]

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[25] *Cf.* the similar evidence presented in *Herndon v. Lowry,* 301 U. S. 242, at 250-53, wherein the defendant's conviction of attempted insurrection was reversed.

The trial court treated the issue of the Communist Party's aims as entirely distinct from the issue of the appellant's knowledge of those aims. On this theory, the court admitted unlimited prosecution testimony by former Communists, even though the events they described were utterly remote from the defendant. Thus the entire first half (seven days) of the trial passed before the defendant's name was even mentioned (Tr. 961). The 1945 national convention of the Communist Party in New York City, which is a crucial episode in the Government's case against the Communist Party, occurred while the defendant was serving in the armed forces of the United States at Bari, Italy (Tr. 1959).

How could a connection be shown between the teaching at a Party school attended by Lautner in New York in 1930 (Tr. 87-105) when the defendant, in Greensboro, was not yet of high school age? Why should Scales be bound by Mrs. Hartle's testimony about unemployed workers' demonstrations during that same year (Tr. 604-05), or her story of Communist control over the personal lives of a few individuals in Seattle (Tr. 723)? Yet these are but three examples of a staggering volume of testimony about persons and events far removed from the defendant, and generally irrelevant to the issues in the case.

To be sure, a federal judge has considerable discretion with respect to the order and scope of proof at a trial. But here the discretion was abused to a degree that hopelessly prejudiced the petitioner. It is too much to expect that a jury which has heard a full week of testimony about the Communist Party "subject to connection" will be able to lay it all to one side, and give weight only to such portions as are later made binding on the defendant. Nor, under such circumstances, can the jury be expected to winnow the few kernels of material evidence from the chaff of erroneously admitted and prejudicial testimony about "Black

Belts," the Stockholm peace appeal (Tr. 662-64), and American policy in China (Tr. 666-70).

(B) The trial court denied petitioner's request to examine the full texts of statements furnished to agents of the Government by prosecution witnesses. The conviction following his first trial had been reversed by this Court on the authority of *Jencks* v. *United States*, 353 U. S. 657. But several months after the *Jencks* decision, Congress enacted Public Law 85-269, now 18 U. S. C. 3500 (Appendix B, *infra*, pp. 88-89). Under the procedure prescribed in this statute, the materiality of the reports requested by the defense, if challenged by the prosecution, is determined by the trial court *in camera*. In the present case, the prosecution did challenge the materiality of certain portions of the reports requested by the defense; such portions were then submitted to the trial judge for his review as prescribed in 18 U. S. C. 3500, and many of them were withheld from the defense.

The defendant challenged (Tr. 678-80) the validity of the procedures set forth in the new statute, insofar as they operated to limit his access to the full texts of these documents. This very point was passed on by this Court in the *Jencks* case (353 U. S. at 668):

> "We now hold that . . . the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less.
>
> "The practice of producing government documents to the trial judge for his determination of relevancy and materiality without hearing the accused, is disapproved. Relevancy and materiality for the purposes of production and inspection, with

> a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness. Only after inspection of the reports by the accused, must the trial judge determine admissibility—e.g., evidentiary questions of inconsistency, materiality and relevancy—of the contents and the method to be employed for the elimination of parts immaterial or irrelevant. See Gordon v. United States, 344 U. S. at 418."

It is clear from the foregoing passage that only a right of full access to witnesses' reports serves to protect the opportunity of the defense for full exercise of its right of cross-examination. Anything less is a denial of due process of law. "Justice requires no less."

Furthermore, the definition of "statement" in subsection (e) of Section 3500 is so arbitrary, capricious and unreasonable that it violates the due process clause. Statements by prosecution witnesses may be useful for impeachment whether or not the witnesses signed or subsequently "approved" them and whether or not they are "substantially verbatim" or "recorded simultaneously." Finally, the application of Section 3500 in the present case violated the Constitutional ban (Art. I, Sec. 9) on *ex post facto* legislation since its effect is substantially disadvantageous to the petitioner, whose alleged crime was committed before the enactment of this statute.

(C) The "Congressional findings" in the Communist Control Act of 1954 (50 U. S. C. 841) and the Internal Security Act of 1950 (50 U. S. C. 781) deprived the petitioner of the opportunity for a fair and impartial trial. The findings in the latter statute have already (*supra*, p. 18) been described. The former finds that the Communist Party "is in fact an instrumentality of a conspiracy to overthrow the government of the United States" and is dedicated "to the proposition that the present constitutional government

of the United States ultimately must be brought to ruin by any available means, including resort to force and violence."

The indictment here charges that the Communist Party advocates the violent overthrow of the government. On this issue of fact, the defendant was entitled to a fair trial, before a jury able to reach an independent, objective and impartial verdict on the evidence. *Cf. Moore* v. *Dempsey*, 261 U. S. 86; *Frank* v. *Mangum*, 237 U. S. 309; *Manley* v. *Georgia*, 279 U. S. 1. But in the face of this Congressional finding, it was impossible for the jury to determine the question of violent overthrow on the basis of an independent, objective and impartial viewing of the evidence.

(D) The grand jury was illegally impanelled. Prior to the trial, petitioner filed a motion challenging the grand jury panel which returned the indictment.[25] The hearing showed that the method for securing names for the panel was that the clerks and jury commissioner requested various individuals[26] to provide the names of persons who were "suitable . . . for jury service" (Mot. Tr. 18-24). The only information received by the jury commission concerning these prospective jurors was their names and addresses. No questionnaires were ever sent to the members of the jury panel prior to placing their names in the box, nor were the individuals who were asked to supply names for jury service ever informed of the qualifications for jurors (Mot. Tr. 34-36).

This method of selecting jurors is an illegal delegation of the clerk's and jury commissioner's duties. *Glasser* v.

[25]Reference is made in this section 4(D) to the separately paginated transcript of the preliminary proceedings on motions in the District Court. These are designated "Mot. Tr.".

[26]Among those solicited were local sheriffs, superintendents of public schools, bank presidents and the Chairmen of the Republican and Democratic parties in the counties in the District.

*United States,* 315 U. S. 60; *United States* v. *Murphy,* 224 Fed. 554. It also results in a jury panel that is not a fair cross-section of the community. *Thiel* v. *Southern Pacific Co.,* 328 U. S. 217. The applicable statute (28 U. S. C. 1864) provides that: "The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing." Here, there is no way of showing whether or not the names of three hundred qualified persons are in the jury box, since the jury commission knew only the names and addresses of the potential jurors. *United States* v. *Silverman,* 129 F. S. 496 (D. Conn). The method of impanelling the jury in this case prejudiced the defendant and worked harm to the jury system. *Ballard* v. *United States,* 329 U. S. 187, 195. This Court, in the exercise of its responsibility to supervise the administration of justice in the federal courts, should dismiss the indictment.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

TAYLOR, SCOLL & SIMON
400 Madison Avenue
New York 17, N. Y.

SMITH, MOORE, SMITH,
SCHELL & HUNTER
Jefferson Standard Building
Greensboro, North Carolina
*Attorneys for Appellant*

TELFORD TAYLOR,
MCNEILL SMITH,
*Of Counsel.*

November 3, 1958.

## APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

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No. 7637.

---

JUNIUS IRVING SCALES,
Appellant,

*versus*

UNITED STATES OF AMERICA,
Appellee.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, AT GREENSBORO.

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(Argued June 13, 1958. Decided October 6, 1958.)

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Before SOPER and HAYNSWORTH, Circuit Judges, and BARKSDALE, District Judge.

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Telford Taylor (McNeill Smith; Bynum M. Hunter; Richmond G. Bernhardt, Jr.: Taylor, Scoll & Simon, and Smith, Moore, Smith, Schell & Hunter on brief) for Appellant, and Victor C. Woerheide, Attorney, Department of Justice, (J. Walter Yeagley, Acting Assistant Attorney General; James E. Holshouser, United States Attorney; Harold D. Koffsky, Philip R. Monahan, Bruce

J. Terris and Jerome L. Avedon, Attorneys, Department of Justice, on brief) for Appellee.

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SOPER, Circuit Judge:

This appeal is taken from a judgment of conviction under the membership clause of § 2(a)(3) of the Smith Act of June 28, 1940, 54 Stat. 670, 671, which has been codified in the U. S. Code of Crimes and Criminal Procedure in the third paragraph of 18 U. S. C. § 2385, as follows:

> "Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government[1] by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, * * *"

The indictment charges that during the entire period from January 1946 up to the date of the filing of the indictment on November 18, 1954, the Communist Party of the United States has been a society and group of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit; and that during the same period the defendant, Junius Irving Scales, in the Middle District of North Carolina and elsewhere, had been a mem-

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[1] i.e., the Government of the United States or the government of any State, Territory, District or Possession thereof.

ber of the Communist Party of the United States, well knowing that it was and is a society and group of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit, the defendant intending to bring about such overthrow by force and violence as speedily as circumstances would permit.

The defendant was first tried and convicted under this indictment in April 1955, and was sentenced to imprisonment for six years; and the judgment was affirmed by this Court in 227 F.2d 581. The Supreme Court of the United States granted certiorari and after argument and confession of error by the United States, under the later decision in *Jencks* v. *United States*, 353 U.S. 657, the judgment was reversed, 355 U.S. 1. At the new trial in February 1958, the jury returned a verdict of guilty and the defendant was sentenced a second time to imprisonment for six years.

The defendant's first point is a repetition of the contention, rejected by this Court on the first appeal, 227 F.2d 586-588, that the membership clause of the Smith Act is invalid on its face under the First and Fifth Amendments since it abridges freedom of speech and imputes guilt merely from association unaccompanied by unlawful conduct. It is admitted that the Supreme Court has upheld the validity of state statutes[2] which punish persons who organize or become members of a society or group formed to advocate or teach criminal anarchy; and also that in *Dennis* v. *United States*, 341 U.S. 494, the Supreme Court upheld the constitution-

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[2]*Gitlow* v. *New York*, 268 U.S. 652; *Burns* v. *United States*, 274 U.S. 328; *Whitney* v. *California*, 274 U.S. 357; *Fiske* v. *Kansas*, 274 U.S. 380; cf. *De Jonge* v. *Oregon*, 299 U.S. 253.

ality of the advocacy and organization provisions of the Smith Act. But it is pointed out that in none of these cases were the defendants accused *only* of membership in the criminal organization, and that the statutes were held not to offend the First Amendment because they were designed to meet a clear and present danger to the state by prohibiting unlawful conduct in which the defendants had participated.

Specifically it is said that the *Dennis* decision was based on findings that the defendants were parties to an existing conspiracy which endangered the safety of the nation since it involved not merely the exposition of an idea but also the advocacy of unlawful action as well as personal intent on the part of the defendants to overthrow the government. Arguing that the membership clause of the Smith Act is constitutionally defective, the appellant seems to say that the clause does not require that the offender be engaged in any unlawful advocacy or party activity, either alone or in concert with other persons, but only that he be a member of the organization with knowledge of its purposes to overthrow the government by violence and hence "membership" as defined in the Act is merely the status and state of mind of a single individual and does not involve a clear and present danger to the state.

The argument is not persuasive since it fails to give proper weight either to the terms of the statute or to the *Dennis* decision in which §§(2)(a)(1) and (a)(3) and §(3), of the Act were specifically held to be constitutional, or to the decision in *United States* v. *Yates*, 354 U.S. 298, where the statute was interpreted and the *Dennis* decision was explained and approved. The terms of the membership clause are not satisfied merely by membership in a Communist group. The requirements are that the accused be a mem-

ber of a society or group who teach, advocate or encourage the overthrow of the Government of the United States by force or violence knowing the purposes of the society or group. In view of these provisions the Supreme Court in the *Dennis* case rejected the argument which is now presented to us in the following passage in its opinion, 341 U.S. 494, 502:

> "The very language of the Smith Act negates the interpretation which petitioners would have us impose on that Act. It is directed at advocacy, not discussion. Thus, the trial judge properly charged the jury that they could not convict if they found that petitioners did 'no more than pursue peaceful studies and discussions or teaching and advocacy in the realm of ideas.' He further charged that it was not unlawful 'to conduct in an American college or university a course explaining the philosophical theories set forth in the books which have been placed in evidence.' Such a charge is in strict accord with the statutory language, and illustrates the meaning to be placed on those words. Congress did not intend to eradicate the free discussion of political theories, to destroy the traditional rights of Americans to discuss and evaluate ideas without fear of governmental sanction. Rather Congress was concerned with the very kind of activity in which the evidence showed these petitioners engaged."

This view was developed and explained in *Yates* v. *United States*, 354 U.S. 298, where the Court said that it had long recognized the distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action, and that the legislative history of the Smith Act shows beyond all question that Congress was aware of this distinc-

tion and hence it could not be assumed that Congress chose to disregard a constitutional danger zone so clearly marked. The Court therefore found it unnecessary to decide the issue in terms of constitutional compulsion and held that it was the purpose of Congress to prohibit the advocacy and teaching of concrete action for the forcible overthrow of the Government and not of principles divorced from action. Showing that the decision in the *Dennis* case was in harmony with this interpretation, the Court said (pages 321 and 322):

> "* * * The essence of the *Dennis* holding was that indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to 'action for the accomplishment' of forcible overthrow, to violence as 'a rule or principle of action,' and employing 'language of incitement,' *id.*, at 511-512, is not constitutionally protected when a group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur. * * * As one of the concurring opinions in *Dennis* put it: 'Throughout our decisions there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken.' *Id,* at 545. There is nothing in *Dennis* which makes that historic distinction obsolete."

The appellant seeks to distinguish these decisions from the pending case because in them the defendants were charged with ***conspiracy*** to violate the teaching and organization clauses of the statute, whereas in the pending case the indictment charges the substantive offense of membership. The

distinction is without significance on the issue of constitutionality. The Scales indictment charges a guilty knowledge of the illegal purposes of the organization and the specific intent on the part of the defendant to bring them about as speedily as circumstances will permit. "No one could conceive," said Chief Justice Vinson in *Dennis* v. *United States*, 341 U.S. at 501, "that it is not within the power of Congress to prohibit acts intended to overthrow the Government by force and violence." The question in any case is "whether the means [adopted by Congress] conflict with the First and Fifth Amendments to the Constitution." In that case it was expressly decided that Congress had the power as a proper means to the end to prohibit a conspiracy to overthrow the Government; and, as Judge Parker pointed out in the first appeal in this case, 227 F.2d at 587, "the membership clause of the statute is of course nothing more nor less than a statute denouncing and making criminal a conspiracy to overthrow the government by force and violence." It is too clear for argument that membership in an organization with knowledge of its purposes and an intent to make them effective is a joint rather than an individual undertaking which gathers its strength from an association or group of individuals inspired by a common purpose. The activities of such a group constitute a clear and present danger to the state and he who joins with open eyes becomes a party to all that he sees.

The appellant also renews the contention, rejected by this court on the first appeal, that the indictment under the membership clause states no punishable offense because of the provisions of §4(f) of the Internal Security Act of 1950, 64 Stat. 987, 50 U.S.C. 783(f). In §2 of this Act, 50 U.S.C. 781, Congress embodied the finding that the Communist movement in the United States is a rigidly and ruthlessly

disciplined organization which seeks the overthrow of the Government of the United States by force and violence, and hence presents a clear and present danger to the existence of the United States and of free American institutions which requires the enactment of legislation designed to prevent the accomplishment of this purpose. Accordingly, §4 (a) of the statute, 50 U.S.C. 783, makes it a crime for any person knowingly to combine or conspire with any other person to perform any act which would substantially contribute to the establishment of a totalitarian dictatorship in the United States under the domination of any foreign government, organization or individual; and §4(c) of the Act makes it unlawful for any agent of a foreign government or any officer or member of the Communist organization knowingly to obtain or receive from any officer of the United States any information which shall have been classified by the President as affecting the security of the United States. Sections 7 and 8 of the Act, 50 U.S.C. 786, 787, provide for compulsory registration of Communist organizations and the members thereof with the Attorney General under a criminal penalty for failure prescribed by §15 of the Act, 50 U.S.C. 794. The registration statements are required to contain the name and address of each individual who is an officer or member of the organization and in case the organization fails to register, it becomes the duty of any individual who is a member thereof to register with the Attorney General.

The legislative history of this statute shows that while it was under consideration Congress became aware that the registration provisions might be held unconstitutional as compelling self-incrimination under §4(a) of the Act making it a crime to conspire to establish a Communist organization in the United States and also as compelling self-

incrimination under the membership clause of the Smith Act.[3] On this account the bill was amended by the enactment of §4(f) of the statute, 50 U.S.C. 783(f), which provides that "neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute."

It is obvious that the provisions of the Internal Security Act which are aimed at membership in a Communist organization relate to the same subject as the membership clause of the Smith Act. Bearing this in mind, the defendant contends that the declaration in §4(f) of the Internal Security Act that membership in a Communist organization by any person shall not constitute per se a violation of subsection (a) of the statute, or a violation of any other criminal statute, effectively nullifies the membership clause of the Smith Act and bars a prosecution of the present case. It is said that the membership clause of the Smith Act must have been in the mind of Congress since there is no other criminal statute to which the last phrase of §4(f) could apply and, therefore, there is no ground for the prosecution of one whose only offense is membership in such an organization.

This contention was carefully considered in the opinion of Judge Parker on the first appeal in this case at 227 F.2d 589, where it was pointed out that the exemption from criminal prosecution under §4(f) is limited to membership per se and does not exempt from prosecution members of the Communist Party who hold membership in the organization with guilty knowledge of its criminal purpose to bring about

[3] S. Rep. No. 1385, 81st Cong. 2nd Sess., pp. 43-44; Cong. Rec. 13739, 13740; H. Rep. No. 3112, 81st Cong. 2nd Sess., 96 Cong. Rec. 15280.

the violent overthrow of the Government. This becomes the more clear in the pending appeal by reason of the contention of the defendant based on the holding of the Supreme Court in the *Dennis* and *Yates* cases that mere membership in a Communist organization unaccompanied by advocacy and teaching of concrete action for the forcible overthrow of the Government is not a punishable offense within the membership clause. With these considerations in mind the meaning of the provision of §4(f) that membership in a Communist organization shall not constitute per se a violation of the Internal Security Act or any other criminal statute becomes obvious. Indeed, it is now settled that a statute forbidding mere membership in a Communist organization would violate the First Amendment. Section 4(f) of the Internal Security Act does not bar the present prosecution.

It is hardly worthwhile to discuss the contention of the defendant that the jury was unable to reach an independent and impartial verdict on the evidence because of the finding of Congress in §2 of the Internal Security Act that the Communist Party was an organization which seeks to overthrow the Government of the United States by force and violence. Every criminal statute is an expression of opinion by Congress that certain conduct is meretricious and should be punished criminally. Such a statute is the Smith Act, and it would be difficult to find a juror who does not know that it was aimed primarily at the Communist organization. See *United States* v. *Lightfoot*, 228 F.2d 861, 870.

The defendant also contends that the membership clause, *as applied to the facts of this case*, is unconstitutional under the First, Fifth and Sixth Amendments. It is asserted that the evidence was not restricted, as it should have been, to the proof of concrete action by the Communist Party and the

defendant for the purpose of overthrowing the Government, but was allowed to range over a wide field so as to include activities in the form of free speech and free assembly protected by the First Amendment. It is also said that the defendant was not "informed of the nature and cause of the accusation" as required by the Sixth Amendment because the jury were instructed that the charge of membership in the indictment could be sustained only by proof that the defendant was an *active* member of the Party, so that a new element was introduced in the accusation which is not mentioned in the statute and is so vague that it presents no ascertainable standard of guilt; and hence the information clause of the Sixth Amendment and the due process clause of the Fifth Amendment were both violated.

We need not stop to give extended consideration to the last contention, for it is obvious that the defendant was not prejudiced by the instruction that in order to convict the jury must find that he was not only a member but an active member of the Party. This instruction was completely in harmony with the view expressed by the Supreme Court that the Smith Act contemplates not merely the advocacy of a theory of government but the advocacy of a concrete action of an unlawful character.

The other contentions obviously relate to the relevancy and sufficiency of the evidence to support the verdict and may be best considered after a statement of the evidence is set forth. It is well, however, to point out preliminarily that special duties with respect to the evidence are imposed upon the trial judge in a case of this kind. He must determine not only whether the evidence offered is relevant and is sufficient to prove the allegations of the indictment, as in the ordinary case, but he must also determine whether the facts proved

constitute such a clear and present danger to the state as to overcome the prohibitions of the constitutional amendments and justify a conviction under the statute. In other words, the judge must decide, as a question of law, whether it is proper from a constitutional standpoint to apply the statute to the situation disclosed by the testimony. This was the position taken by the trial judge in the *Dennis* case, and it was approved not only in the illuminating discussion by Judge Learned Hand at 183 F.2d 215, 216, but also in the opinion of Chief Justice Vinson in the following words (341 U.S. at 513, 514, 515):

> "When facts are found that establish the violation of a statute, the protection against conviction afforded by the First Amendment is a matter of law. The doctrine that there must be a clear and present danger of a substantive evil that Congress has a right to prevent is a judicial rule to be applied as a matter of law by the courts. The guilt is established by proof of facts. Whether the First Amendment protects the activity which constitutes the violation of the statute must depend upon a judicial determination of the scope of the First Amendment applied to the circumstances of the case.
>
> * * * *
>
> "The question in this case is whether the statute which the legislature has enacted may be constitutionally applied. In other words, the Court must examine judicially the application of the statute to the particular situation, to ascertain if the Constitution prohibits the conviction. We hold that the statute may be applied where there is a 'clear and present danger' of the substantive evil which the legislature had the right to pre-

vent. Bearing, as it does, the marks of a 'question of law,' the issue is properly one for the judge to decide."

## The Evidence

With these considerations in mind we now summarize the evidence that was adduced in the district court to support the allegations of the indictment: (1) that the Communist Party of the United States was at all times from 1946 until the finding of the indictment, a society which taught and advocated the overthrow of the United States by force and violence as speedily as circumstances would permit; and (2) that the defendant during this period was a member of the Party, well knowing its purposes and intending to effectuate them. The evidence relates to both categories and that which relates to the second not only shows the personal participation and activities of the defendant but supplements the general evidence as to the character and purposes of the Party.

Five ex-Communists gave testimony as to the character of the Party, two of whom, John Lautner and Barbara Hartle, were bona fide members and three, William Garfield Cummings, Obadiah Jones and Bellarmino J. Duran, became members in order to secure information for the Federal Bureau of Investigation.

Lautner was born in Hungary in 1902 but was brought to America at the age of sixteen months and lived in Youngstown, Ohio, until he was six, when he was taken back to Hungary. He there had a public school education and one and a half years at a teachers' college. He returned to Youngstown at the age of eighteen and became a naturalized citizen of the United States in 1926. He was a member

and a full-time employee of the Communist Party from 1929 to 1950, excepting the period of his military service between November 1942 and May 1945. In 1950 he was accused of being a Government agent and was expelled from the Party. At that time he was a leading member of the Party, having been chairman of the New York State Review Commission since 1947 and a member of the National Review Commission, the Party's top security board, since 1948. Since he had been a loyal member of the Party he was deeply disturbed by his expulsion and got in touch with the Federal Bureau of Investigation and volunteered to cooperate with the objectives of that organization in its investigation of the Party's activities. Since his expulsion he has testified as a Government witness in seventeen Smith Act cases and in numerous hearings before different Federal boards and departments and during this period he received $125 a week plus travel expenses.

When he joined the Party in 1939 he became a student with twenty others from different parts of the country at a national training school sponsored by the Party's Hungarian National Bureau and carried on in the City of New York. He attended another training school in 1941 with six other students, all of whom were high Party officials, and from 1931 to 1945 he was himself a teacher at various Party schools in Canada as well as in New York and Cleveland.

During the period from 1930 to 1931 he was taught, and in turn taught his own classes, that the ultimate aim of the Party was to bring about a fundamental change in the economic, social and political structure of capitalism in the United States and that this change could not be achieved peaceably but could and would come as a result of force and violence in wresting power from the capitalist class in this

country. Later, in 1947 and 1948, he taught Marxism-Leninism at the functionary school classes in New York, teaching substantially the same doctrine as that above described. The purpose of the course was to explain the application of the "classic" theories of Marx, Engels, Lenin and Stalin to the present day. These writings taught revolutionary principles of action, which included the acceptance of reforms obtained by legal means in order to use them as a screen for violent activities of a revolutionary character.

In July 1945, the National Convention held in New York reconstituted the Party. It was chiefly concerned with putting an end to the "revisionist" policies of Earl Browder, formerly General Secretary of the Party, which aimed at a peaceful rather than a revolutionary road to Communism in this country. In order to effectuate the change, the Party leaders conducted classes for students of various grades, which included the use of an outline of nine "lessons" each covering a specific phase of Marxism-Leninism with reference to the Communist classics. These outlines contained passages which specifically called for the use of force in overthrowing the governments of capitalist nations and taught that the liberation of the oppressed classes was impossible without violent revolution and destruction of the apparatus of state power.

When Lautner was appointed Chairman of the New York State Review Commission as a successor to J. Peters, he acquired a key job in Communist Party security. His duties included cleansing the Party of deviationist tendencies. No dissent and no deviation was allowed. At the National Convention in 1948 he acted as security chief, seeing to it that not only the press but other curious outsiders were excluded and that the whereabouts of every delegate was

known at all times. After the convention he was assigned the job of lining up a series of hiding places and communication points for the New York organization's underground system and finding trustworthy members in whose custody sums of money up to $20,000 could be deposited.

On cross-examination it was brought out that in 1930 Lautner married a young woman, at the direction of the Party, in order to enable her to become a naturalized citizen. She was a stranger to him at the time and he never saw her again after the ceremony. Subsequently, acting on the Party's instructions, he secured a divorce and remarried, but in 1941 he got an annulment based on the false statement that he was a practicing Catholic and the further statement that his second wife had falsely represented that she would embrace the Catholic faith.

Mrs. Hartle was born in 1908 in Evans, Washington. She was graduated from Washington State College and later engaged in various occupations including work on a magazine, department store advertising and the operation of a lending library and gift shop. She became interested in the writings of Karl Marx in 1931 and joined the Socialist Party in Spokane. There she came in contact with Communists who were recruiting Party members amongst the Socialists. She was persuaded by them to join a Communist-front organization called the Friends of the Soviet Union. By 1934 she held a Communist Party membership. She became secretary of a unit of ten members, was indoctrinated in the principles of Marxism-Leninism and was given various assignments in propaganda activities and the distribution of Communist educational material. She attended a Communist school in Seattle and in 1937 became the manager of a Communist book store which circulated Com-

munist literature including pamphlets and newspapers. She attended a "Stalin" school in Seattle at the expense of the Party and studied various Marxist and Stalinist texts. From then on she became more and more interested and more and more prominent in the Party and was given various positions of responsibility. She was a full-time Party worker from 1940 until 1952 and held numerous offices, including membership on both the District Board and the District Committee of the Northwest District, an area which included Washington, Oregon and Idaho. In 1945 she succeeded to the number two job in the District, that of Organizational Secretary.

Mrs. Hartle played an important part in the activities of the Party in 1945, when a marked stiffening of Party doctrine took place. She was a delegate from the Northwest District to the emergency National Convention held in New York City in July of that year. Immediately prior to the convention a letter written by Jacques Duclos, the French Communist chief, was published in this country first in the *New York World-Telegram* and later in various Party publications. It became the subject of anxious discussion in Party circles and the principles which it espoused were adopted. The substance of the letter was that, under the leadership of Earl Browder, the Communist Party of the United States had revised and departed from the doctrines of Marxism and Leninism and had given up the class struggle and the dictatorship of the proletariat as necessary to the achievement of the aims of Communism. A resolution to this effect was offered by the Resolutions Committee, of which Mrs. Hartle was a member, and was passed by the Convention. It was concluded that the Party should not pursue the peaceful road to Marxist socialism but the revolu-

tionary road to upset the capitalist system in the interest of the working class.

In April 1946, Mrs. Hartle was assigned by the Northwest District to attend the National Training School at a summer resort near New York City. She attended its sessions for a period of two months with thirty other students all of whom were officers and functionaries of the Party. The school was under the direction of one Jacob Mindel. It was part of a re-education program the purpose of which was to train theoreticians and propagandists and to dispose of and to destroy the last remnant of "revisionism" of the Browder era. Emphasis was placed on the struggle between the capitalist and working class and the duty of the Communist Party to foment the class struggle by revolutionary tactics. The general aim was said to be a proletarian revolution to accomplish the dictatorship of the proletariat. The students were taught that a spontaneous struggle of the working class would never succeed and that in order for Marxist socialism to succeed a seizure and retention of power through a dictatorship was essential. It was taught that the United States was the foremost imperialist country in the world and was at the stage for proletarian revolution. The students were told that the members of the Communist Party must go amongst the workers and the masses and gain leadership of them by participating in their struggle. During these studies the classic texts of Marx, Engels, Lenin and other leaders were used. The students were told that the United States was a "bourgeois state" and "must be forcibly overthrown by the working class led by the Communist Party," and that the Communist Party must prepare the working classes for this seizure of power. Two examples of the revolutionary seizure of the state by force and violence were given; i.e., the Paris Commune, which was described

s the first attempt c e proletariat to storm the citadel of
pitalism, which failed because the proletariat did not take
fficient steps to retain the power, and the 1917 Bolshevik
evolution in Russia. Mindel explained that imperialist
ars could "only be ended by the civil war of the workers
gainst their own government," with the Communist Party
the lead.

Mrs. Hartle herself used the instructions she received at
is school when she later taught in the Party's training
hools in the Northwest District between the years 1946
1950. In summarizing what she taught between 1945 and
50, before she went underground, she said that the Party
al was the dictatorship of the proletariat which could only
obtained by forcible means and that force and violence
uld be used to seize control when the conditions were ripe
this event.

In 1950, Mrs. Hartle disappeared into the Party's under-
ound apparatus at the direction of her superiors. For a
le over two years she lived under an assumed name and
ved frequently from one place to another in Washington
l Oregon. The purpose of the underground was to con-
l the identity of Party members in positions of impor-
ce so that in case leaders of the Party were arrested for
lating the Smith Act or for other reasons the Party would
lack trained personnel ready and able to carry on. Mrs.
rtle welcomed the change from the strenuous work she
previously performed but began to question the impor-
ce of the work and to lose interest in effectuating the
ty purposes. This marked the beginning of her break
h the Party, but before this actually took place she was
ested by the FBI in September 1952, and in 1953 was
cted, tried and convicted for violating the Smith Act.

She was sentenced to five years imprisonment and ordered to pay a fine of $1000. She was released on bail pending appeal. During the trial she was notified by the Party that she was to be expelled for failing to follow Party discipline and for refusing to attend certain underground meetings. She agreed, however, to stand by the Party during the trial, and did so. On April 12, 1954, however, she made contact with the FBI and subsequently withdrew her appeal and was imprisoned for twenty and a half months until she was paroled on February 1, 1956. During her incarceration and subsequently, she testified before Congressional committees and for the Government in certain investigations into Communist activities and in criminal prosecutions brought under the Smith Act.

In line with this testimony was the evidence of William Garfield Cummings of Toledo, Ohio, who joined the Party at the request of the FBI in February 1944. He testified that in December 1945 he attended the Party's Mid-West Regional School at Chicago and was taught by George Siskind, the principal instructor, that the capitalist system must be overthrown and that this could be done only by force and violence. He was also taught that the United States was in the last "imperialistic" stage of capitalism and that the only solution for the working class was the overthrow of the Government by force and violence, just as was done in the Bolshevik Revolution in Russia.

Obadiah Jones of St. Louis, Missouri, a Baptist minister and elevator operator, gave evidence as to the operation of a Communist Party training school which he attended in that city in 1947. The school was conducted under the guidance of George Siskind, the principal teacher, and Ralph Shaw, the chairman of the Party in Missouri. The students

were furnished with books containing the teachings of Marx, Lenin and Stalin and were taught that the only way that the Negro problem of the "Negro nation" in the Black Belt of this country could be solved was by a proletarian revolution led by the Communist Party whereby capitalism would be wiped out by violence and bloodshed. The students pledged themselves to work for the Party and to carry out the instructions of its leaders even though it meant to fight and to kill. Jones made reports of his connection with the school and the Party to the FBI and testified for the United States in Communist investigations and prosecutions.

Bellarmino Duran, a resident of Denver, Colorado, who was brought up in a household where Spanish was spoken, was educated in grade schools in Wyoming, Idaho and Colorado. In March 1951, he attended a special school in Los Angeles, California, which was established by the National Education Committee of the Communist Party of the United States and was known as the National School for Mexican Cadres. At that time he was a member of the Communist Party of the State of Colorado and was furnishing information to the FBI. The persons in charge of the school were Art Berry, District Organizer of the Party for the districts of Montana, Idaho, Colorado, Utah, New Mexico, Arizona and Texas; and Alberto Moreau from the Jefferson School in New York City. All of the students in the school spoke Spanish. At the beginning teaching was in his language and later English was used. Berry explained to the students that the school was established to enable Mexican cadres to study the theories of Marx and Lenin in relation to the liberation of the Negro, Puerto Rican and Mexican people of southwest United States. Moreau spoke in an introductory talk about the monopoly of capitalism

which had progressed into imperialism and the necessity of teaching the masses that the system must be changed and that this could only be done through a proletarian revolution in which the workers in industry and agriculture would participate and in which the speaker visualized himself as carrying a gun against the capitalists. The students were taught that the proletarian revolution could not be brought about in a peaceful way but could only be accomplished by force and violence through which the state machinery of the bourgeoise, including the courts and the military establishments, would be smashed. He explained that the Communist Party would be the vanguard of the movement and after it was successful and the Party was in control the guns would be collected from the people so that they in turn might be controlled.

Duran was a member of the Party from 1948 until April 1955, when he was expelled upon the charge that he had taught force and violence in violation of the Constitution of the Communist Party. At that time he was asked to sign a note containing the false statement that the Communists did not teach the violent overthrow of the Government, but he refused to do so.

During his connection with the Communist Party he received compensation from the FBI for his services and subsequently testified in criminal prosecutions under the Smith Act and in other investigations on behalf of the Government.

## Evidence As To Scales

Ralph C. Clontz, Jr. testified at length in regard to the activities of the defendant Scales, of which he had first-hand knowledge from personal association. He also testified

as to the activities and teachings of the Communist Party in general. He was the son of a Presbyterian minister and a resident of Charlotte, North Carolina. He was educated in the local schools and graduated from Davidson College in 1947, and from the Duke University Law School in 1950. After having completed three and a half years at Davidson, he enlisted in the army in 1942. When he was discharged in 1946 he held the rank of lieutenant and worked for military intelligence in Salzburg, Austria. In 1948, having become aware of Communist activity in North and South Carolina and fearing imminent war with Russia, he offered his services to military intelligence. They sent him to the FBI and he arranged with that organization to attempt to penetrate the Communist Party and find out what was going on. The FBI accepted his proposition but warned him that he would serve without compensation, and that if he got into trouble the Government would not recognize him and come to his aid.[4]

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[4]Clontz was not paid anything by the FBI for his activities during the year 1948 but paid all of his expenses, including travel, out of his own pocket. He was at that time enrolled at the Duke University Law School, but held full-time employment as the Division Sales Manager for Carolina Motor Club with upwards of twenty field representatives, i.e., salesmen, working under him. In 1949, his activity in the Party and at the law school made it necessary to cut down his salesmen to three. Around July 1949 he began to receive reimbursement from the Government for out-of-pocket expenses such as gasoline and the cost of Communist literature and other expenses necessary to carry on his investigation. In 1948 he had received $24.95 for services and expenses. At the end of 1949 he started receiving $20.00 a month from the Government. He was then married and had one child. The first of 1950 this monthly compensation was increased to $40.00 in addition to expenses; and when the Party sent him to the Jefferson School in New York in the summer of 1950 the Government paid him the equivalent of a first lieutenant's pay for the three-weeks period. When he returned to North Carolina his monthly payment was increased to $60.00 and remained at that until he went on full-time duty as a Government agent in January 1951. Thereafter he received a net sum of $450.00 a month plus expenses. He had, in

Thereupon, on September 9, 1948, he wrote to the defendant Scales telling him that he was a law student and was interested in Communism. Very shortly thereafter Scales sent him a large box filled with Communist literature and a letter inviting him to call at Scales' residence in Carrboro, North Carolina. Clontz called and had dinner with Scales and his wife. After dinner a discussion about Communism took place in which one McGirt, another Communist who came in later, participated. Scales explained that he had received a lot of Communist literature from the Party headquarters in New York. A later visit took place shortly before Christmas and at this time Clontz expressed the view that he had learned from his reading that Communism was a wonderful system and if the Party would educate people, they would vote the Communist Party into control of the Government. In a vigorous and extended reply, Scales said that this was completely impossible since the Government controlled all of the media of communication and education, as well as the Army, and that Communist success could only be accomplished by a militant force like that which had brought about the Bolshevik Revolution in Russia. Scales furnished Clontz with the works of Stalin, in which it was said that the Bolshevik Revolution could serve as a model of tactics in any country and that the oppressed classes could not be liberated without a violent revo-

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the meantime, opened a law office, but he took a "cover job" in New York as a fraudulent claims inspector with the Association of Casualty and Surety Companies while he was acting as special agent for the Government. He received $300.00 a month from the Association but turned this over to the Government. He worked for the Association during the day and as a special agent for the Government at night at least four nights a week. Other than his wife, no one knew of his Government connection. The salary of $450.00 lasted until February 3, 1953, when he quit Government service and commenced the full-time private practice of law. His association with the Government cost him money—his expenses in New York were $100.00 a month more than he received from the Government with the result that his savings of $2500 were wiped out.

lution and the destruction of the state. The revolutionary strategy was based on the idea that the revolution could be accomplished by bringing two classes together in common cause: first, the working class or proletariat and second, the "Negro nation" located in the thirteen Southern States. This was the repeated statement of Scales on various occasions in 1949 and 1950. At one time he said that the situation in the United States was closely analogous to the situation in Russia at the time of the Bolshevik Revolution when the Communists were in the minority in the month of July but were nevertheless victorious in seizing control of the government in the following October. Scales did not expect a revolution in the United States very soon but thought that if a depression came there would be a bloody revolution.

In December 1949, Scales suggested that Clontz become a member of the Party and Clontz agreed that Scales submit his application to the Party leaders. Around about this time Clontz was given several pieces of literature, including an outline entitled "Thirty Years of the Communist Party U.S.A.," a copy of the Constitution of the Party, a Study Course of the Communist Party, the Working Class and Industrial Concentration. The first part of 1950 Scales informed Clontz that certain Communists at the university at Chapel Hill had formed a Karl Marx Study Club and later certain representatives of the Party from New York gave lectures to the club at the university. At these lectures it was stated that the Communists believed that a revolution of the kind that had taken place in the Soviet Union was a certainty and a necessity and that things were moving fast and the revolution would certainly come before long.

Clontz became a member-at-large of the Communist Party on or about January 17, 1950. He was not given any

card but was given a receipt for $1.50 for initiation and the first month's dues. Thereafter Scales gave Clontz private tutoring to prepare him for work in the Party. When asked when the revolution would come, Scales expressed the view that it would not come very soon but would come in time and that his fourteen month old daughter would marry a Communist in the United States. He felt that if a depression was imminent, it would greatly accelerate the coming of the revolution. During this period Clontz met Bernard Friedland, District Organizer for the Communist Party in the Carolinas, who questioned him about his background and his beliefs. Scales furnished Clontz with a number of Communist books for study in March 1950, including the "Foundations of Leninism," the "Problems of Leninism" by Stalin, and other works. In these works were a number of passages in which it was clearly stated that it was absurd to think that the revolution could be carried out peaceably without violence. It was said that the Soviet Union would not send troops to America to help in the revolution but would furnish experienced revolutionaries as instructors and supervisors.

In June 1950, Clontz told Scales that he would like to attend the summer session of the Communist school in New York called "The Jefferson School of Social Science." Accordingly, Scales arranged for Clontz's admission and saw to it that he was provided with a scholarship to cover his expenses. In August 1950, during the three-week course, Clontz received special instructions from one Doxey Wilkerson, an instructor of the school and a member of the Party's National Committee. Wilkerson instructed Clontz that while some Party members had hoped that the Communists could gain power by peaceful means, it was necessary to "forget all this drivel," and that there was no longer any pretense

that the Communists could win by the people's vote and that a violent revolution was necessary, which would come about by combining the forces of the "Negro nation" and the working class within the Communist Party. Clontz was also instructed that the Party in the South had been partly underground for a long time and that plans were being made for operation on an individual basis in secret communications from New York to the rest of the country. Clontz was instructed to remain under cover when he returned to North Carolina and maintain contact with an undercover Communist club. As part of the concealment process, an official statement had been issued by the Education Commission of the Party disowning or disclaiming certain study outlines, texts and publications. This was done to establish a technicality for Communists on trial and their attorneys to make conviction more difficult. It would not, however, hamper the Party because the instructors could fill in orally the revolutionary part.

During the period in which Clontz was being instructed in the doctrines of the Communist Party the defendant Scales was engaged in similar activity with Government witnesses Otis R. Readis and Charles Benson Childs. Readis was a native of North Carolina employed by the Western Electric Company at Winston-Salem. Childs was a resident of High Point, North Carolina, a student at High Point College (1948-1950), an employee of the Western Electric Company at Winston-Salem (1951), and later a student at the University of North Carolina. Scales arranged for each of these men to attend Communist schools. He sent Readis to the Jefferson School in New York and Childs to a Party school for outstanding Party members from the Virginia and Carolina District which was held on a farm near Winston-Salem. Scales himself was the director of this school.

In both of these schools the students were instructed in the principles of the Communist Party.

It was brought out in the testimony of these North Carolina witnesses that Scales occupied an important position in the Party as the chairman of the North and South Carolina District and as such reported regularly to the National Committee on the activities of the Party in his district, and saw to it that the directives of the National Committee were carried out in that area. These included the recruiting of members into the Party and the selection of promising Party members for further education in Communist doctrines. In December 1951, according to the testimony, he disappeared into the Communist underground. The evidence showed that he was completely familiar with the "Marx-Lenin classic" and that as a leader of the Communist Party he believed in and advocated the violent overthrow of the Government at the earliest feasible opportunity.

The evidence offered on behalf of the appellant Scales is stated as follows in the brief filed on his behalf in this court:

> "The appellant did not testify. For the defense, ten witnesses were called, nine of whom knew Scales during the period that he was a member of the Communist Party, and testified in support of his character and conduct. These included two clergymen, a radio station employee, a professor at the University of North Carolina, a Greensboro businessman, a textile mill worker, the wife of a Superior Court judge, and the appellant's mother and aunt. None of them had heard the appellant advocate force and violence, and several of them testified to Scales' statements and attitudes, heard by and known to them, which were inconsistent or incompatible with any such advocacy."

From the testimony of members of his family it was learned that Scales was born in Greensboro, North Carolina, in 1920. After finishing his secondary education in local schools he was an undergraduate student at the University of North Carolina and held various jobs in Greensboro and High Point, North Carolina. In June 1941 he was married and in December of that year, shortly after the Japanese attacked Pearl Harbor, he enlisted in the Army Air Force. He attended the Officers Candidate School but was dropped before securing a commission. He went overseas in 1945 and was discharged in February 1946. He returned to the University of North Carolina and was graduated in February 1946, after which he undertook certain graduate work in history. In the autumn of that year he made a public announcement of his membership in the Communist Party.

Taking this evidence in the light most favorable to the prosecution, which must be done if the historic function of the jury is to be recognized, it is fair to say that, contrary to the appellant's contentions, the allegations of the indictment have been sustained. There is indeed no substantial conflict in the evidence since the only testimony of the defendant's bearing on the merits of the case, i.e., the testimony of certain of his neighbors that they never heard him advocate force and violence, does not preclude the finding that he really believed in the tenets of Communism and advocated them in dealing with actual or prospective Party members. Nor does this evidence on his behalf contradict in any way the description of the Communist Party and its activities given by the witnesses for the United States.

It was clearly shown that the Communist Party "is of sufficient size and cohesiveness, is sufficiently oriented to-

wards action, and other circumstances are such as reasonably to justify apprehension that action will occur." (354 U.S. at 321). It is organized and staffed on a national scale with territorial divisions presided over and directed by district leaders. It is constantly engaged in the infiltration of the working classes and in recruiting members in various parts of the country. It holds annual conventions, attended by representative leaders from the various districts and policed for security reasons to limit the attendance to loyal members, which determines the policies to be pursued and the methods to be employed by Party members. It maintains an underground apparatus in which important Party members in danger of arrest or interference disappear under assumed names in order that the Party may not lack leadership in times of emergency. It masks its purposes by false statements when it deems it expedient to do so.

It maintains training schools for officials and for novitiates in various parts of the country, in this case there is specific reference in the testimony to schools in New York, Canada, Seattle, Chicago, St. Louis and Los Angeles; and it distributes literature to members and prospective members. The true character and aim of the organization is shown by the teaching provided at these schools, as to which there is abundant uncontradicted testimony. At all of them, without exception, the students are taught that the United States is in the grip of a capitalistic society which oppresses and exploits the workers, and that this grip cannot be broken by peaceful and democratic means but only by the destruction of the institutions of the state by force and violence in a revolution of the workers led by the Communist Party in the vanguard. This doctrine is not held up to the students as a bare theory but as a basis for concrete action which must and will be taken whenever in the future a favorable

opportunity presents itself. This doctrine was reaffirmed by the action taken by the Party at its National Convention in 1945 when the peaceful policies advocated by Earl Browder were condemned and repudiated and the recommendations of Duclos, the leader of French Communism, were endorsed. On these facts the jury was entirely justified in reaching the conclusion that the elaborate structure of the Communist Party was set up for unlawful revolutionary concrete action accompanied by force and violence rather than for the mere advocacy of a theory of government.

The evidence in regard to Scales himself not only reinforces the conclusion as to the character of the Communist Party but justifies his conviction of charges contained in the indictment. We do not know what influences led him to become a member of the Party, for neither the United States nor the defendant offered any evidence on this point, but we do know that he was a prominent and active member of the organization, who served as chairman of the Carolina District of the Party and was active in recruiting suitable Party members amongst the university students in North Carolina, and that he furnished them with Communist literature and advised and instructed as to the Party doctrines and arranged for their attendance at established Communist schools where formal classes of instruction were given. He himself was a director of one of these schools and in harmoney with their course of instruction, as above described. He himself in his contacts with new members consistently and repeatedly preached the revolutionary doctrine that, in the interest of the proletariat, the institutions of the state must be destroyed by force and violence as soon as it was reasonably possible to do so. He was constantly in touch with the national leaders of the organization and obeyed

their instruction that he should go underground under an assumed name.

We reach the conclusion of law, as did the trial judge, that the evidence in regard to the activities of the Communist Party and of Scales constituted proof of advocacy of concrete action, as distinguished from the promulgation of a theory, which created a clear and present danger of substantive evil beyond the protections of the First Amendment and within the right and power of Congress to prohibit. In our opinion, this conclusion is in accord with the approval given in *Yates* v. *United States*, 354 U.S. at 321, 323-324, to the essence of the *Dennis* holding in these words:

> "* * * Although the jury's verdict, interpreted in light of the trial court's instructions, did not justify the conclusion that the defendants' advocacy was directed at, or created any danger of, immediate overthrow, it did establish that the advocacy was aimed at building up a seditious group and maintaining it in readiness for action at a propitious time. In such circumstances, said Chief Justice Vinson, the Government need not hold its hand 'until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required.' 341 U.S., at 509."
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> "* * * Bearing in mind that *Dennis*, like all other Smith Act conspiracy cases thus far, including this one,

involved advocacy which had already taken place, and not advocacy still to occur, it is clear that in context the phrase just quoted referred to more than the basic agreement to advocate. 'The mere fact that [during the indictment period] petitioners' activities did not result in an attempt to overthrow the Government by force and violence is of course no answer to the fact that there was a group that was *ready to make the attempt*. The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come *for action*, coupled with . . . world conditions, . . . disposes of the contention that a conspiracy to advocate, as distinguished from the advocacy itself, cannot be constitutionally restrained, because it comprises only the preparation. It is the existence of the conspiracy which creates the danger. . . . If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added.' 341 U.S., at 510-511 (emphasis supplied)."

We find nothing at variance with these conclusions in the recent decisions of the Supreme Court in *Nowak* v. *United States*, 356 U.S.—and *Maisenberg* v. *United States*, 356 U.S. —. See *United States* v. *Silverman*, 2 Cir., 248 F.2d 671.

## Admissibility of Evidence

It is contended that the judge erred in the admission of irrelevant evidence of an inflammatory character describing the activities of the Communist Party so that the defendant as a member of the Party was prejudiced in the eyes of the

jury. Three documents relating to the Korean War are singled out, which were published by the Communist Party or under its auspices. They were a publication entitled "Pre-Convention Discussion Bulletin" issued by the Communist Party of the United States; a copy of the Moscow newspaper "Trud"; and a pamphlet entitled "I Saw the Truth in Korea" by Allen Winnington, a correspondent of the *Daily Worker* in Peking. They were given to Clontz by Scales in 1950 and 1951, the first two in Washington, D. C. and the third in Durham, North Carolina. They accused the United States of launching and waging a criminal, reactionary, imperialistic war in Korea to enslave the North Korean people and deprive them of their independence. The last mentioned document described a small area in the Rangwuel Valley near Taejon, where it was said that the bodies of 7000 political prisoners were found in shallow graves who had been massacred under American supervision and in accordance with American instructions.

Motion for mistrial on the ground that the publications were calculated to inflame the passions of the jury was denied. The judge, however, cautioned the jury that they should weigh the evidence objectively and should not allow themselves to be excited or inflamed so as to impair their ability to try the case impartially as between the Government and the defendant.

In addition, the defendant complains of the admission in evidence of Communist activities relating to the existence of a Black Belt in southern United States where the Negro population was oppressed and denied the right of self-determination; and the general contention is also made that the judge should not have admitted evidence of Communist

doctrines and aims entirely distinct from Scales' knowledge of them.

In our opinion the evidence was properly received. That part to which the attack is chiefly directed consisted of documents handed by Scales to Clontz which were clearly intended to blacken the United States and stir up animosity against it and thus weaken its ability to defend itself should a revolution be attempted. It clearly served to corroborate the testimony in regard to Scales' activities in securing Party members and promoting the general objectives of the Party.

That part of the evidence which pertained to the activities of the Party with which he had no immediate connection was relevant, since it tended to prove the allegations of the indictment that the Communist Party of the United States was a group of persons who taught and advocated the overthrow of the Government of the United States by force and violence. That Scales had knowledge of these objectives is shown by direct testimony as to his own teachings and activities on the Party's behalf. In respect to this contention, we said in denying the former appeal, 227 F.2d at 589:

> "* * * We think that this complaint is entirely without merit. The evidence as to the teachings carried on by the party and the documents used in the teachings was clearly competent to show the aims and purposes of the party; that which related to infiltration, subversion and the arousing of dissension had a direct bearing on the purpose to overthrow the government by force and violence when a favorable opportunity should present itself; * * *"

## CHARGE OF THE COURT

The case was fairly submitted to the jury by the judge's charge. The jury were told that in order to convict the defendant they must find that the Communist Party teaches or advocates the overthrow of the Government of the United States by force and violence as speedily as circumstances will permit; that the defendant was a member of this Party who well knew of its teachings and purposes and that the defendant himself specifically intended to bring about such overthrow.

The jury were warned, however, that it is not criminal to hold or express the belief that the Government of the United States should be completely changed or to have such a change of government as a purpose or aim, or to express the opinion that the Government will at some time be overthrown by force and violence and that it is not criminal to criticize the Government and its policies, whether you agree or not with the truth or falsity of the criticism.

The jury were further told that it could not convict the defendant merely because he was a member of the Party no matter what its purposes and teachings are; and that teaching in the abstract what is meant by the aim to overthrow the Government by force and violence is not criminal, and that without being criminal the Communist Party could try to persuade its members to espouse the belief that the Government should be overthrown by force and violence as speedily as circumstances permit, since this is no more than advocating an idea; but that if the Party went further and with the intent to overthrow the Government by force and violence advocated a principle of action which called on its members to take forcible and concrete action at some

propitious time to overthrow the Government by force and violence, and pressed that call in such a way as to incite its members to take concrete and forcible action for such overthrow, such activities were forbidden by the Smith Act; but those to whom the advocacy is addressed must be urged to do something now or in the future rather than merely to believe in something.

Summarizing this portion of the charge the Court said:

> "It is not the abstract doctrine of overthrowing or destroying organized government by unlawful means which is denounced by the Smith Act, but rather the teaching and advocacy of action for the accomplishment of that purpose, by language reasonably and ordinarily calculated to incite persons to such action. Accordingly, you cannot find that the Communist Party of the United States was a society or group of persons who teach or advocate the overthrow or destruction of the Government of the United States by force and violence, unless you are satisfied beyond a reasonable doubt that the Party did in fact so teach and advocate, and did so with the intent that such teaching or advocacy be of a rule or principle of action, and by language reasonably and ordinarily calculated to incite persons to such action, all with intent to cause the overthrow or destruction of the Government of the United States by force or violence as speedily as circumstances would permit."

Finally, the jury were told that although the defendant admitted that he was a member of the Party it was not sufficient that he be simply a member. It must be more than a nominal, passive, inactive or purely technical membership,

and that in determining whether he was an active or inactive member the jury must consider how much of his time and effort he devoted to the Party; "to be active he must have devoted all or a substantial part of his time and efforts to the Party;" and that a specific intent on the part of the accused to bring about the overthrow of the Government as speedily as circumstances would permit was a necessary and indispensable requisite of the offense.

## THE JENCKS STATUTE

The defendant also contends that he was denied a fair trial because he was not permitted to inspect the entire reports and statements made to the Federal Bureau of Investigation before the trial by Government witnesses with respect to the subject matter of their subsequent testimony. During the trial the defendant called for the production of these reports and statements so that he might inspect them. They were accordingly produced but they were first delivered to the District Judge *in camera*, who excised therefrom such portions as do not relate to the subject matter of the testimony, and then turned them over to the defendant's attorney for his use. The defendant contends that this procedure did not conform with that laid down by the Supreme Court in *Jencks* v. *United States*, 353 U.S. 657. That case involved the conviction of the president of a labor union for false swearing in an affidavit, filed pursuant to §9(h) of the National Labor Relations Act, that he was not a member of the Communist Party. The principal witnesses for the Government were two Party members in the pay of the FBI, who testified concerning the Party activities of the defendant. On cross-examination they testified that during the course of their investigation they made reports to the FBI concerning the defendant's activities. Thereupon

the defendant's attorney moved the Court to produce these reports for inspection and use in cross-examination. The judge denied the motion and his action was affirmed on appeal (226 F.2d 540, 553) on the ground that no preliminary foundation was laid showing inconsistency between the contents of the reports and the testimony of the witnesses.

The Supreme Court reversed, holding that the defendant was not required to lay such a foundation because a sufficient foundation was established by the testimony of the witnesses that their reports related to the events and activities covered by their testimony. The Court said that to require the accused first to show conflict between the reports and the testimony would be to deny the accused evidence relative and material to his defense, since in the absence of an admission of conflict he would be helpless to know or discover conflict without inspecting the reports; and hence a requirement of showing conflict would be incompatible with our standards for the administration of criminal justice in the United States. The Court further held that relevancy and materiality for the purposes of production and inspection with a view to use on cross-examination are established when the reports are shown to relate to the testimony of the witness. The Court condemned the practice of producing government documents to the trial judge for his determination of relevancy and materiality without hearing the accused and held that the defense must be entitled initially to see the reports to determine what use may be made of them; only thereafter may the trial judge determine the admissibility of the reports and the method to be employed for the elimination of immaterial or irrelevant parts. Conceding that the protection of vital national interests may militate against public disclosure of documents in the Government's possession, the Court held that in a criminal action the

choice lies with the Government and if it elects not to comply with an order to produce relevant statements of reports of witnesses in its possession touching the subject matter of their testimony, the criminal action must be dismissed.[5]

The procedure prescribed in the *Jencks* case had not been generally recognized or followed in the Federal courts, nor had the practice been uniform. One accepted procedure required a showing of inconsistency between the pre-trial reports and the testimony of the witness as a basis for the production of the report. The Fifth Circuit, in its decision in the *Jencks* case, 226 F.2d 540, 552, and its earlier decision in *Shelton* v. *United States,* 205 F.2d 814, 815, found encouragement for this course in the decision of the Supreme Court in *Gordon* v. *United States,* 344 U.S. 414, 418-419, as did the First Circuit in its decision in *Scanlon* v. *United States,* 223 F.2d 382, 385-386. A different procedure was approved in the Second Circuit in the opinion of Judge

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[5]The Court said, 353 U.S. 668:

"* * * We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F.B.I., touching the events and activities as to which they testified at the trial. We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less.

"The practice of producing government documents to the trial judge for his determination of relevancy and materiality without hearing the accused, is disapproved. Relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness. Only after inspection of the reports by the accused, must the trial judge determine admissibility—e.g., evidentiary questions of inconsistency, materiality and relevancy—of the contents and the method to be employed for the elimination of parts immaterial or irrelevant. See Gordon v. United States, 344 U.S. at 418."

Learned Hand in *United States* v. *Krulewitch*, 145 F.2d 76, 78-79. This practice did not compel the defense to lay a preliminary foundation of inconsistency but required the delivery of the reports to the judge, if requested by the defendant, as soon as it appeared that they had been made by the witness and related to the subject matter of his testimony. It then became the duty of the judge to examine the statements *in camera* and if he should find something in them contradictory to the testimony of the witness, they were then delivered to the defendant for such use as he might desire.[6] It will be observed that in both of these procedures a showing of inconsistency had to be made, but the latter practice was the more helpful to the defendant since it relieved him of the difficulty of showing inconsistency in the reports before they were produced for examination.

The *Jencks* decision gave rise to much discussion in legal circles[7] and very quickly led to the passage of the Act of Congress of September 2, 1957, 71 Stat. 595, whereby Chapter 223 of 18 U.S.C., entitled "Witnesses and Evidence," was amended by adding a new section 3500. The purpose of this statute, as shown by the Legislative History set out in 2 U.S. Code, Congressional and Administrative News, 85th Congress, First Session, 1957, page 1861 et seq., was to provide an exclusive procedure for handling demands for the production of statements and reports of witnesses in court so as to preserve the rights of defendants and at the same time to protect confidential information in the possession of the Government. An additional purpose was to correct what seemed to Congress to be a widespread misinterpretation

[6] See also *United States* v. *Cohn*, 2 Cir., 145 F.2d 82, 92; *United States* v. *Ebeling*, 2 Cir., 146 F.2d 254, 256; *United States* v. *Lebron*, 222 F.2d 531; *Boehm* v. *United States*, 8 Cir., 123 F.2d 791, 807-808.

[7] 46 Georgetown L.J. 180, note; 67 Yale L.J. 674.

and popular misunderstanding of the opinion in the *Jencks* case, as shown by decisions referred to in the Legislative History, pages 1864-1868, which had led to the unnecessary disclosure of irrelevant government reports and interfered with the prosecution of criminal cases by the United States.

The new Act[5] provides in substance that no statement or report in the possession of the United States which was

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[5] 18 U.S.C. §3500.

"§3500. Demands for production of statements and reports of witnesses

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

"(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court *in camera*. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctnes of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably

made by a Government witness to an agent of the Government shall be the subject of discovery or inspection until the witness has testified on direct examination in the trial of the case; and that after he has testified the court, on motion of the defendant, shall order the United States to produce any statement of the witness in its possession which relates to the subject matter of his testimony. If the United States claims that any such statement contains matter which does not relate to the subject matter of the testimony, the court is required to order the United States to deliver the statement for the inspection of the court *in camera*, and thereupon the court is required to excise the irrelevant portions and to deliver the balance of the statement to the defendant for his use. If in such case the defendant is convicted, the entire text of the statement must be preserved by the United States and, in the event of an appeal, must be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. If the United States elects not to comply with an order of the court to deliver any such statement to the defendant, the court is re-

required for the examination of such statement by said defendant and his preparation for its use in the trial.

"(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Pub. L. 85-269, Sept. 2, 1957, 71 Stat. 595."

quired to strike the testimony of the witness from the record and proceed with the trial, unless the court in its discretion determines that the interest of justice requires that a mistrial be declared.

The second trial of the pending case, now before us on appeal, took place after this statute was passed and the judge complied with its provisions when the defendant demanded the production of the reports of the Government witnesses for his inspection. The Government delivered the entire reports to the judge with the request that certain portions indicated therein should be excised by the judge *in camera* on the ground that they did not relate to the testimony of the witnesses. The judge complied with this request, examining all the reports and excising such portions as in his opinion did not relate to the testimony, and thereupon delivered the balance of the reports to the defendant. The defendant concedes that the judge complied with the statute but contends that the Act is unconstitutional since it did not fully comply with the requirements of due process laid down in the *Jencks* decision.

Through some misunderstanding as to the defendant's wishes the original unexcised reports of the Government witnesses were not sent to this court with the record on appeal but at the defendant's request the Government has now made them available to this court, as required by the statute, and they are now in our possession. We have examined them to determine the correctness of the rulings of the trial judge and we concur in his finding that the excised portions of the reports did not relate to the subject matter of the testimony of the witnesses. It remains to pass on the contention of the defendant that the new Act is unconstitutional.

In our opinion the *Jencks* decision does not require this conclusion and we hold the Act to be valid. It must be borne

in mind in the first place that the position of the Government in the pending case is not the same as it was in *Jencks*, so that the Supreme Court has not yet passed on the specific question now before this court. In *Jencks* the Government objected to the production of any part of the reports on the ground that inconsistency with the testimony had not been shown, and the court sustained the objection. It was this ruling that the Supreme Court passed upon, holding that the entire reports should be produced for the inspection of the defendant's attorney so that he might offer the whole or such parts of them in evidence as he thought wise, whereupon it would become the duty of the trial judge to decide whether the reports should be admitted or certain parts thereof eliminated as immaterial or irrelevant. In other words, the Court did not pass upon the question, which arises under subsection (c) of the new statute, of what is to be done when the United States claims that a particular statement ordered to be produced contains some matter which does not relate to the subject matter of the testimony. In any event, it is our opinion that this statutory provision, whether it be regarded as an addition to or a change in the *Jencks* procedure, does not amount to a denial of the due process required by the Fifth Amendment but is merely a procedural regulation which preserves certain substantial rights of the accused and at the same time protects the Government files from the danger of unnecessary disclosure of its sources of information.

Most significant is the fact that the new statutory procedure does not deny the defendant access to any information which would be helpful to his case. Production of the reports for inspection does not depend upon the permission of Government custodians or the attorneys for the prosecution; and the determination of what portions of the re-

ports should be excised is not left to the Government but is entrusted to the impartial and experienced judgment not only of the trial judge but also the judges of the appellate courts and the Justices of the Supreme Court themselves, if in their discretion they determine to review the case. The standards set by *Jencks*, 353 U.S. at 669, that justice requires no less than that the defense be entitled to see the reports to determine what use may be made of them is satisfied; and justice requires no more.

The defense is denied only the opportunity to be heard on the question whether the excised portions of the reports bear on the testimony of the witnesses; and this does not amount to a denial of due process. It does not interfere with any constitutional right to which the defendant is entitled but merely restricts his examination of the Government files which he desires to make, not because he has any reason to believe that they will yield anything helpful to his case but on the chance, which costs him nothing, that something will be turned up that will weaken the prosecution. In this situation it is clearly within the province of Congress to protect the right of the United States to withhold facts which it has gathered and to shield the sources of its information in the public interest so long as no pertinent information is withheld from the defendant. This can be done only by entrusting the determination of relevancy to someone other than the parties to the cause, and the method devised by Congress is obviously fair both to the Government and to the defendant and represents a reasonable exercise of Congressional power. In the *Jencks* decision the Supreme Court was not dealing with constitutional questions. It was exercising what is described in *McNabb* v. *United States*, 318 U.S. 332, 440, 441, "its supervisory authority over the administration of criminal justice in the United States * * *

by the establishment of civilized standards of procedure and evidence"; and Congress, by the passage of the interstitial legislation contained in §3500 was merely exercising its concurrent power in the same field to provide for a case that the Court did not envisage.

The conclusion that the provisions of the new statute were not violative of the constitutional rights of the defendant is supported by the decision of the Second Circuit in *United States* v. *Gandia, et al.*, decided May 15, 1958, 255 F.2d 454, where it was held that the defendants were not entitled to have their convictions vacated under 28 U.S.C. 2255 merely because the trial judge, having inspected the reports made by a Government witness and finding them not to be inconsistent with the witnesses' testimony, denied the defense access to them. The court said that in the *Jencks* case the Supreme Court did not hold that constitutional considerations entitled defendants access to witnesses' reports but announced only an evidentiary rule to be followed in the trial of criminal cases in the United States courts. See also *United States* v. *Angelet*, 255 F.2d 383; *United States* v. *Spangelet*, 2 Cir., 27 L.W. 2063; *United States* v. *Procter & Gamble Co.*, 356 U.S. 672; *United States* v. *Consolidated Launderies Corp.*, S.D., N.Y., 159 Fed. Supp. 860.

### Impaneling of Grand Jury

Finally, the defendant makes the contention that the indictment is invalid because the grand jury was illegally impaneled. The method of selecting jurors was that the Deputy Clerk of the District Court and the Jury Commissioner sent out a number of form letters to reputable citizens requesting them to furnish a list of persons available for jury duty. The letters were sent, amongst others, to superintendents of

public schools, bank presidents, sheriffs, and the chairmen of the Republican and Democratic Parties in the counties in the district. In response tthe court officials received a list of names and addresses from which they eliminated those persons whom they deemed unfit on the basis of personal knowledge and those who appeared from the inspection of the list to be unsuitable. For example, those listed as physicians were stricken. The names were then placed in the jury box and when the time came to select the jury for a term of court the names of fifty-six persons were drawn at random from the box and summoned for jury service. The reverse side of the summons contained a questionnaire covering the qualifications of the jurors and when the returns came in they were checked to ascertain whether the persons summoned were qualified under the jury statute, 18 U.S.C. §1861. When the prospective jurors appeared in answer to the summons, the names of fifty-six qualified persons were put in a hat from which nineteen were drawn by lot and they became the grand jury, the rest forming the petit jury panel. The jurors were then questioned by the judge as to their payment of taxes for the previous two years and any litigation pending before the court, and whether they had any reason to be excused. A grand jury selected in this manner found the indictment on which the pending case was tried.

It does not appear from the evidence that any qualified person or class of persons was excluded from jury service or that any disqualified person served on the grand jury chosen in this case or that the defendant was in any way prejudiced by the procedure. It is, nevertheless, contended that the grand jury was illegally impaneled, since the panel did not consist of persons whose names were "publicly drawn from a box containing the names of not less than

three hundred qualified persons at the time of each drawing." It is said that the jury officials did not comply with the statute because they did not make sufficient investigation of the persons on the list before their names were put in the box and hence the prosecution must fail even though the defendant was not prejudiced, since the injury in such case affects the jury system and the community at large. See *Ballard* v. *United States*, 329 U.S. 187, 195; *Dow* v. *Carnegie-Illinois Steel Corp.*, 224 F.2d 414; *United States* v. *Dennis*, 2 Cir., 183 F.2d 201; *Walker* v. *United States*, 8 Cir., 93 F.2d 383; *Dunn* v. *United States*, 6 Cir., 238 F.2d 908; *United States* v. *Silverman*, D.Conn., 129 F.Supp. 496. A motion to dismiss the indictment on this ground was filed but it was denied by the judge who held that the selection of the grand jury did not involve any substantial deviation from the requirements of the statute and that in any event the defect had been waived by the failure of the defendant to raise the point within a reasonable time.

We think that the motion to dismiss was properly denied. It clearly appears that the defendant not only suffered no prejudice but that he waived the point by failing to comply with the provisions of Rule 12 of the Federal Rules of Criminal Procedure. Section (b)(2) of the rule provides that defenses and objections based on defects in the institution of the prosecution or in the indictment may be raised only on motion before trial and that the motion shall include all such defenses and objections then available to the defendant and that the failure so to act constitutes a waiver thereof, although the court, for cause shown, may grant relief from waiver. The rule further provides that the motion shall be made before the plea is entered but the court may permit it to be made within a reasonable time thereafter. The de-

fendant did not comply with the provisions of this rule, as is shown by the following recital of facts.

He was indicted on November 18 and arraigned on December 7, 1954. At that time he declined court appointed counsel, secured a reduction in bail and a delay of the arraignment for one week to enable him to secure counsel of his own choosing. This period was subsequently extended to December 16. By that time the defendant had not secured an attorney and the court appointed counsel for the purposes of arraignment only. The defendant pleaded "not guilty," but notified the court that he reserved the right to make certain pre-trial motions, and the court granted a further delay until January 14, 1955. The defendant expressed complete satisfaction with the counsel who represented him on December 16.

On January 14, the defendant appeared with a New York attorney and requested an additional sixty days for the filing of motions and secured an order of the court permitting him to file such motions by February 18, with the right of the Government to reply on March 2, and a hearing of the motions on March 8. These dates were satisfactory to the defendant's attorney. On February 18, eight motions were filed but none of them attacked the grand jury. The hearing took place on March 8, at which the defendant was represented by a Washington attorney. By order of March 14 these motions were denied.

Subsequent, on March 15, the defendant filed the motion attacking the grand jury now under consideration. Evidence as to the method of selecting the jury was taken, a hearing was had and on April 15, as we have seen, the motion was denied. This ruling was entirely justified under

the terms of Rule 12, as interpreted by the authorities. The information on which the motion was based was at all times available to the defendant and yet he failed to take action despite liberal extensions of time. See *United States* v. *Silverman*, 129 F.Supp. 496, 513; *Nations* v. *United States*, 8 Cir., 52 F.2d 97, 99; *Agnew* v. *United States*, 165 U.S. 36, 44; *United States* v. *Thompson*, 2 Cir., 144 F.2d 604; *Wright* v. *United States*, 8 Cir., 165 F.2d 405; *Notes of Advisory Committee*, fol. Rule 12, F.R. Crim. Pro., 18 U.S.C., p. 206.

Accordingly, the judgment of the District Court is

*Affirmed.*

## APPENDIX B

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitution of the United States:

1. Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

2. Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

B. Statutes

1. 18 U. S. C. Section 2385 (the Smith Act):

Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the

government of any political subdivision therein, by force or violence, or by the assassination of any officers of any such government; or

Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

2. 50 U. S. C. Section 783 (Section 4 of the Internal Security Act of 1950):

(a) It shall be unlawful for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship, as defined in paragraph (15) of section 782 of this title, the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government,

foreign organization, or foreign individual: *Provided, however,* That this subsection shall not apply to the proposal of a constitutional amendment.

* * *

(c) It shall be unlawful for any agent or representative of any foreign government, or any officer or member of any Communist organization as defined in paragraph (5) of section 782 of this title, knowingly to obtain or receive, or attempt to obtain or receive, directly or indirectly, from any officer or employee of the United States or of any department or agency thereof or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, any information of a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States, unless special authorization for such communication shall first have been obtained from the head of the department, agency, or corporation having custody of or control over such information.

* * *

(f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 787 or section 788 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute.

3. 50 U. S. C. Sections 841 and 843 (the Communist Control Act of 1954):

Section 841. The congress finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through the public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchial chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any avail-

able means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed.

Section 843. (a) Whoever knowingly and willfully become or remains a member of (1) the Communist Party, (2) any other organization having for one of its purposes, or objectives the establishment, control conduct, seizure, or overthrow of the Government of the United States, or the government of any State or political subdivision thereof, by the use of force or violence, with the knowledge of the purpose or objective of such organization shall be subject to all the provisions and penalties of the Internal Security Act of 1950, as amended, as a member of a "Communist-action" organization.

(b) For the purposes of this section, the term "Communist Party" means the organization now known as the Communist Party of the United States of America, the Communist Party of any State or subdivision thereof, and any unit or subdivision of any such organization, whether or not any change is hereafter made in the name thereof.

4. 28 U. S. C. Section 1861 (Qualifications of jurors):

Any citizen of the United States who has attained the age of 21 years and resides within the judicial district, is competent to serve as a grand or petit juror unless:

(1) He has been convicted in a state or federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

(2) He is unable to read, write, speak and understand the English language.

(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service.

(4) He is incompetent to serve as a grand or petit juror by the law of the State in which the district court is held.*

5. 28 U. S. C. Section 1864 (Manner of drawing names of grand and petit jurors):

The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing.

The jury box shall from time to time be refilled by the clerk of court, or his deputy, and a jury commissioner, appointed by the court.

* * *

The jury commissioner and the clerk, or his deputy, shall alternately place one name in the jury box without reference to party affiliations, until the box shall contain at least 300 names or such larger number as the court determines.

* * *

*Section 9.1 of the General Statutes of North Carolina states that a juror must be a person who resides in the county, who is over 21 years of age and who is "of good moral character" and has "sufficient intelligence to serve as a member of grand and petit juries." The statute excludes from any jury service all those "who have been convicted of any crime involving moral turpitude or who have been adjudged to be *non compos mentis*".

6. Public Law 85-269; 71 Stat. 595.

Chapter 223 of title 18, United States Code, is amended by adding a new section 3500 which shall read as follows:

"§ 3500. Demand for production of statements and reports of witnesses

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

"(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such

withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

"(d) If the United States elects not to comply with an order of the court under paragraph (b) and (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement,' as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

Approved September 2, 1957.

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No. [redacted]87

# In the Supreme Court of the United States

OCTOBER TERM, 1958

JUNIUS IRVING SCALES, PETITIONER

*v.*

UNITED STATES OF AMERICA

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,
*Solicitor General,*

J. WALTER YEAGLEY,
*Acting Assistant Attorney General,*

PHILIP R. MONAHAN,
*Attorney,*
*Department of Justice, Washington 25, D. C.*

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932129—58

# In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 488

JUNIUS IRVING SCALES, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES

On April 21, 1955, petitioner was convicted, following a trial by jury in the United States District Court for the Middle District of North Carolina, under the so-called "membership clause" of the Smith Act, 18 U. S. C. 2385, proscribing being or becoming a member of a society, group, or assembly of persons who teach, advocate, or encourage the overthrow by violence of the Government of the United States, knowing the purposes thereof. He was sentenced to six years' imprisonment. On appeal to the Court of Appeals for the Fourth Circuit, the judgment of conviction was affirmed on November 7, 1955, *Scales* v. *United States*, 227 F. 2d 581.

On March 26, 1956, this Court granted certiorari. 350 U. S. 992. The petition for the writ urged four

questions—(1) whether the "membership clause" the Smith Act is unconstitutional on its face or as plied; (2) whether the indictment charges an offe under the laws of the United States in view of Secti 4 (f) of the Internal Security Act of 1950 (50 U. S. 783 (f)), providing that neither the holding of of nor membership in any Communist organization sh constitute *per se* a violation of that or any other crim nal statute; (3) whether the evidence was sufficie to support the conviction; and (4) whether, "in fo particular and important respects", petitioner w denied a fair trial (No. 626, Oct. Term, 1955 [No. Oct. Term, 1956; No. 3, Oct. Term, 1957], p. 2). E compassed in the fourth question were the followi subsidiary questions—(a) whether the grand ju was illegally impanelled; (b) whether the "Congr sional findings" in the Communist Control Act 1954 (50 U. S. C., Supp. V, 841) and the Internal S curity Act of 1950 (50 U. S. C. 781) deprived pe tioner of a fair trial; (c) whether the trial court err in denying petitioner's request to examine certain wr ten statements previously furnished to the FBI two prosecution witnesses (this being substantially t same production-of-documents issue which was rais and subsequently decided in *Jencks* v. *United Stat* 353 U. S. 657); and (d) whether certain allegedly "i competent, irrelevant, remote and inflammatory" te timony was received (*id.*, pp. 20–24).

Following the submission of briefs on the merits a oral argument, this Court, on June 3, 1957, entere an order restoring the case to the docket for r

argument. 353 U. S. 979.[1] In September 1957, the Government filed a supplemental memorandum which, *inter alia*, pointed out that petitioner in this case, as well as the petitioner in the *Lightfoot* case, was entitled (at least) to a new trial under the rationale of the *Jencks* decision, 353 U. S. 657 (Supplemental Memorandum for the United States on Reargument, Nos. 3 and 4, Oct. Term, 1957, pp. 1–2). On October 14, 1957, this Court, citing its *Jencks* decision, 353 U. S. 657, entered an order reversing the Fourth Circuit's affirmance of petitioner's conviction "[u]pon consideration of the entire record and the confession of error by the Solicitor General". *Scales* v. *United States*, 355 U. S. 1.[2]

Petitioner was thereafter re-tried and, on February 21, 1958, again convicted (Tr. 2217). At the second trial, the procedure followed with respect to the production for defense use of prior statements to the FBI by prosecution witnesses was—with a qualification to be mentioned below (*infra*, p. 9)—that prescribed by 18 U. S. C. 3500, as added by Public Law 85–269, approved September 2, 1957 (71 Stat. 595)—popularly known as the Jencks Act.[3] Petitioner was again sentenced to six years' imprisonment, and, on appeal to the Court of Appeals for the Fourth Circuit, the judg-

[1] "Similar action was taken on the same date with respect to a companion case from the Seventh Circuit involving the membership clause". *Lightfoot* v. *United States*, 353 U. S. 979.

[2] The same action was taken, on the same date, in the *Lightfoot* case. *Lightfoot* v. *United States*, 355 U. S. 2.

[3] The provisions of this Act are set forth at Pet. App. 88–89.

ment of conviction was, on October 6, 1958, affirm
The present petition for a writ of certiorari seek
view of this judgment.

I

With the exception of the question of the cons
tionality of the Jencks Act (Pet. 27–28), the quest
raised by petitioner are substantially the same as t
raised by him in the former petition.[5] We do not
pose the granting of the petition for a writ
certiorari on any point other than that issue.

II

1. Petitioner's first challenge to the constitut
ality of the Jencks Act (18 U. S. C. 3500, set f
at Pet. App. 88–89) relates to subsection (c). T
subsection provides, in pertinent part, that "[i]f
United States claims that any statement ordere
be produced under this section"—*i. e.*, any state
(as defined in subsection (e)) of a prosecution
ness in the possession of the United States w

[4] The Fourth Circuit's second opinion, which has no
been reported, appears at Pet. App. 31–81.

[5] Compare the present "Questions Presented" (Pet. 2; an
Pet. 24–30) with the questions urged in the former pe
(No. 626, Oct. Term, 1955 [No. 29, Oct. Term, 1956; No. 3,
Term, 1957], pp. 2, 20–24 (summarized at p. 2, *supra*.).
the evidence adduced at the second trial, the sufficiency of
is challenged here, is not identical with the evidence ad
at the first trial, it is sufficiently similar that there c
be said to be reasons for excluding the sufficiency of th
dence issue at this time which did not equally apply previ
and the prior grant of certiorari included that issue.
summary of the evidence adduced at the second trial, s
opinion below at Pet. App. 43–63.

"relates to the subject matter as to which the witness has testified"—"contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use * * *." Petitioner argues that this statutory procedure is not reconcilable with this Court's holding in the *Jencks* case, 353 U. S. 657, and is unconstitutional.

Even if the *Jencks* decision is based on constitutional grounds, however (and we do not agree that it is, see *infra*, pp. 7–8), the statutory procedure is fully consonant with *Jencks*.

It is clear that the mere fact that a government witness has in the past given a statement or statements to a government agent or agents on matters relating to the subject matter of his trial testimony would not require that *all* past statements by this witness to government agents—on any subject whatever—be turned over to the defense. Petitioner makes no such claim and the *Jencks* decision makes no such suggestion. It is only statements which *relate to the subject matter of the witness' testimony* that must be turned over. But there is obviously no more reason for turning over to the defense non-germane portions of a witness' statement which is in part germane (because it touches on—but only in

part—the subject matter of his testimony) than there is for turning over a statement *no* part of which is pertinent to that subject matter. The defendant is fully protected against the possibility of an erroneous or arbitrary ruling by the trial judge as to the non-germane portions of a statement germane in part. He is entitled under subsection (c) (see Pet. App. 88–89) if he so desires—and the procedure indicated was followed here (see opinion below, Pet. App. 74)—to have the entire statement preserved for inspection by the appellate court in the event that he is convicted and elects to appeal. The statutory procedure thus fully protects the accused's impeachment rights while at the same time safeguarding the privacy of government records in which the accused has no proper interest.

Petitioner quotes from the *Jencks* opinion (Pet. 27–28) language which he claims supports his contention that that decision holds that statements to a government agent by an informant-witness which are relevant in part (because they refer in part to matters concerning which he has given testimony) must be made available to the defense in their entirety for potential cross-examination purposes. That language must be read and interpreted, however, in the light of the underlying considerations to which we have adverted. So read, we submit that it gives no support to petitioner's argument. The thrust of that language, as of the decision, is that only the defense can adequately appraise the value for impeachment purposes of statements of an informant-witness which *in fact* touch upon or relate to a matter concerning which he

has testified. But the question of whether a statement of the witness relates to a topical area with respect to which he has testified is a question of fact which the judge is well able to decide without assistance from the defense.

What we have said has assumed, *arguendo,* that the *Jencks* decision was based on constitutional grounds of due process. We believe, however, that this Court did not in that case purport to lay down a basic rule of constitutional law, but rather (pursuant to its general supervisory powers over the administration of justice in the federal courts) a procedural principle, in the nature of a rule of evidence, to be applicable in all federal criminal trials in the absence of a definitive statute. In holding that the trial court had erred in failing to order the production of the statements of Ford and Matusow, this Court said that it was following its prior decision in *Gordon* v. *United States,* 344 U. S. 414. It clarified that decision by holding that (contrary to the views of the lower courts in *Jencks*) "a preliminary showing of inconsistency" between the witness' testimony and his prior statement was not, under *Gordon,* "a prerequisite to" the accused's right to inspect the prior statement (353 U. S. at 666–667). But *Gordon* makes very clear that it was decided, not on constitutional principles, but on the basis of "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience" and "[*i*]*n the absence of specific legislation*" (344 U. S. at 418; emphasis added). It would follow, therefore, that the *Jencks* decision likewise was based on common law prin-

ciples, as interpreted in the light of reason and experience, and did not purport to lay down a fundamental principle of due process, beyond the power of Congress to alter or amend by legislation.*

2. The second respect in which petitioner challenges the constitutionality of Section 3500 relates to the definition of "statement" in subsection (e). The term is there defined as (Pet. App. 89)—

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

This definition, petitioner argues, "is so arbitrary, capricious and unreasonable that it violates the due process clause. Statements by prosecution witnesses may be useful for impeachment whether or not the witnesses signed or subsequently 'approved' them and whether or not they are 'substantially verbatim' or 'recorded simultaneously' " (Pet. 28).

---

* This conclusion has the support of such decisions as *United States* v. *Lev*, pending on petition for a writ of certiorari to the Court of Appeals for the Second Circuit (Nos. 435, 436, 437); *United States* v. *Gandia*, 255 F. 2d 454 (C. A. 2); *United States* v. *Angelet*, 255 F. 2d 383 (C. A. 2); *United States* v. *Sheba Bracelets*, 248 F. 2d 134, 144–146 (C. A. 2), certiorari denied, 355 U. S. 904. See also *United States* v. *Palermo*, 258 F. 2d 397 (C. A. 2), pending on petition for a writ of certiorari (No. 471).

While we think petitioner's challenge of the constitionality of the definition contained in this subsecon to be untenable because this is an area of trial ractice which it is proper for Congress, by statute, regulate (see *supra*, pp. 7–8), the question need not e reached here. For in this case the *Jencks*-type maerials which were in fact turned over to the defense ere not limited to "statements" of the type defined subsection (e), but included agent-prepared sumaries (if any) of oral statements made by the witesses to the FBI. In other words the Government, making available to the defense the records of prior tatements to the FBI by the prosecution witnesses ouching upon the subject matter of their testimony, id not limit itself to statements of the kind defined subsection (e), but turned over everything which as conceivably demandable under the *Jencks* decion, without regard to the subsection (e) definition. here is accordingly no basis for petitioner's chalenge of the subsection (e) definition; he is here seekng to argue, in the abstract, a theoretical question hich has no pertinency to the facts of this case.[7]

[7] In neither court below did petitioner contend that he had not een shown documents which he was entitled to see despite the mitations of subsection (e) of the statute. Rather, petitioner onfined his objections to the excision of portions of documents therwise made available to him—a point discussed *supra*, pp. 4–8. ecause this contention was not raised below the Government had o prior occasion to place upon the record the fact which it now serts—*i. e.*, that all relevant documents were made available to etitioner regardless of the subsection (e) limitations of the statute. In *United States* v. *Lev*, *supra*, p. 8, fn. 6, failure to make a ocument available to the petitioner at the trial was held to be armless error because, were a retrial to be ordered, the document ould nevertheless be unavailable to the defense under the new

3. Petitioner, finally, contends that "the application of Section 3500 in the present case violated the Constitutional ban (Art. I, Sec. 9) on *ex post facto* legislation" because his "alleged crime was committed before the enactment of this statute" (Pet. 28). This contention, however, is made for the first time in this Court, the point having been urged neither in the District Court nor in the Court of Appeals. It is, accordingly, too late to raise the point now. Cf. *Yakus* v. *United States*, 321 U. S. 414, 444–445; Rule 51, F. R. Crim. P. In any event, the point is clearly without substance. Cf. *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 593–596; *Beazell* v. *Ohio*, 269 U. S. 167, 170; *Mallett* v. *North Carolina*, 181 U. S. 589, 592–597.

CONCLUSION

For the reasons stated, we do not oppose the granting of certiorari with respect to any question urged in the petition other than that related to the constitutionality of the Jencks Act (18 U. S. C. 3500). With respect to the latter question, it is respectfully submitted that the petition should be denied.

J. LEE RANKIN,
*Solicitor General.*
J. WALTER YEAGLEY,
*Acting Assistant Attorney General.*
PHILIP R. MONAHAN,
*Attorney.*

DECEMBER 1958.

---

statute. Here, somewhat the converse situation exists: any supposed defect in subsection (e) has no bearing on this case because petitioner was, in fact, shown all that he would be entitled to see even if subsection (e) were deleted from the statute.

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IN THE

# Supreme Court of the United States

**October Term, 1958**

No. [redacted]

JUNIUS IRVING SCALES,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

BERNARD WEISBERG,
231 So. La Salle Street,
Chicago 4, Illinois,

OSMOND K. FRAENKEL,
120 Broadway,
New York 5, New York,

*Counsel for American Civil Liberties Union, Amicus Curiae.*

ROWLAND WATTS,
*Of Counsel.*

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IN THE

# Supreme Court of the United States

**October Term, 1958**

**No. 488**

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JUNIUS IRVING SCALES,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

---

### Interest of *Amicus*

The American Civil Liberties Union, appearing herein with the consent of the parties, filed with the Clerk of the Court, is a nationwide non-partisan organization devoted solely to the protection and advancement of constitutional rights which are fundamental to the democratic way of life. It has no other program, either political, economic, social or philosophical.

The re-affirmation of petitioner's conviction on rehearing by the United States Court of Appeals again brings before this Court the so-called "membership" provisions of the Smith Act. *Amicus* believes that this conviction is

inconsistent with the First Amendment freedoms of speech and association and that the constitutional questions which it raises are distinct from those already considered by this Court in the *Dennis* case. Significant issues are presented, the resolution of which will have a vital effect on freedom of political discussion and association in America today. Amicus has no interest in the ideas or beliefs of this petitioner and, accordingly, addresses itself solely to what it believes to be the questions of principle here involved.

## Question to Be Argued

*Amicus* believes that the central civil liberties issue in this case is the relationship between the statute and the indictment laid thereunder and freedom of speech and association. Accordingly, this brief will be devoted solely to a discussion of the validity of the statute and the indictment, under the First Amendment to the Constitution.

## The Statute and the Indictment

The petitioner in this case was indicted and convicted under the membership provisions of Section 2 of the Smith Act which, together with the organizing provisions, read as follows:

> "Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government [in the United States] by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—shall be fined not more than $10,000 or imprisoned not more than 10 years, or both. * * *" 18 U. S. C. 2385.

The indictment charges:

1. That the Communist Party of the United States was during the times alleged, a group of persons who

teach and advocate the overthrow of the government of the United States by force and violence as speedily as circumstances would permit, and

2. That the defendant was a member of the said Communist Party knowing that it advocated the doctrine charged in paragraph 1, and intending to bring about such overthrow by force and violence as speedily as circumstances would permit.

## ARGUMENT

### The Membership Provisions of the Smith Act and the Indictment in This Case Violate the First Amendment to the Constitution

The decision of this Court in *Dennis* v. *United States*, 341 U. S. 494, is the starting point for any discussion of the constitutionality of the membership provisions of the Smith Act. That case upheld the convictions of a group of Communist Party leaders for conspiracy to violate the advocacy and organizing provisions of Section 2 of the Smith Act. The defendants were convicted of conspiring to (1) organize as the Communist Party of the United States a group of persons who advocated the overthrow of the government by force and violence and (2) advocate the duty and necessity of overthrowing the government by force and violence.

The prevailing opinion, written by Mr. Chief Justice Vinson, recognized that legislation punishing political speech is permitted under the First Amendment only when the speech in question, considering the circumstances in which it occurs, gives rise to a clear and present danger of a substantive evil which Congress has the power to prevent. In *Dennis*, the substantive evil was an attempt to overthrow the government by force and violence. The

requisite clear and present danger was held to exist in both of its aspects, first, the nature of the defendants' activities—

> "the formation by petitioners of * * * a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action. * * * It is the existence of the conspiracy which creates the danger." 341 U. S. at 510, 511.

and second, the setting in which they occurred—

> "coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned * * * " 341 U. S., at 511.

Both aspects of the clear and present danger test were emphasized in the statement,

> "Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution." 341 U. S. at 516.

Under *Dennis*, not all advocacy of the doctrine of violent overthrow may be punished. Only such advocacy as creates a clear and present danger, considered in the setting in which it occurs, can constitutionally be criminalized. Although such doctrine is likely to arouse the strongest hostility in the community at large, it is nevertheless protected by the constitutional guaranty of free political debate, absent clear and present danger.

The elements of the statutory crime of membership stand in sharp contrast to the activity punished in *Dennis*. They are:

> 1. That the defendant belonged to the organization in question,

2. That the organization to which the defendant belonged advocated the overthrow of the government by force and violence and

3. That the defendant knew such advocacy to be the purpose of the organization.

On its face, the statute punishes knowing membership in a group advocating the doctrine of violent overthrow even where the defendant disagrees with such advocacy. The indictment in the instant case seeks to obviate this result by alleging as an additional element that the defendant intended to bring about the overthrow of the government by force or violence as speedily as circumstances would permit. The government here relies upon the holding in *Dennis* that such an intent is a necessary part of an offense under the advocacy and organizing provisions of the statute. *Dennis* reached this conclusion on the ground that, "Certainly those who recruit and combine for the purpose of advocating overthrow intend to bring about that overthrow" 341 U. S. at 499. But no such inference justifies importing an intent requirement into the membership provisions of the statute. Indeed common experience concerning the likelihood of disagreement within political organizations points to the opposite conclusion.

But even if the statute is interpreted as permitting the portion of the instant indictment which charges an intention to bring about violent overthrow as speedily as circumstances permit, the elements of the membership offense may be proved by evidence which falls far short of that required by the Constitution. The only act which must be shown is that of membership or association. The individual charged need never have engaged in any other conduct designed to further the forbidden teaching. He need not himself have engaged in any advocacy. Guilty knowledge can be found from evidence that the defendant was acquainted with the literature on which the prosecution

relies to show that the organization advocated the doctrine of violent overthrow. Or it might be enough if the defendant attended meetings and heard speeches which the jury decides expressed the prohibited doctrine. And an unlawful intent may be found by a jury from the act of membership, coupled with guilty knowledge. With no overt act other than membership to guide it, the jury, seeking knowledge and intent, is "adrift on a sea of speculation." The emphasis is on what the defendant thinks rather than what he does. Since the crux of the crime is association with groups advocating violent revolution, the danger is great that convictions will be based not on the acts or even the state of mind of the defendant but rather on a general antipathy towards those with whom he has associated.

How can membership in a group advocating violent overthrow unaccompanied by any other overt act, even when coupled with guilty knowledge and intent, create a clear and present danger? The answer offered by the court below was to treat such membership as participation in a conspiracy. In *Frankfeld* v. *United States*, 198 F. 2d 679, 684, Judge Parker said:

> "Membership in an organization renders aid and encouragement to the organization; and when membership is accepted or retained with knowledge that the organization is engaged in an unlawful purpose, the one accepting or retaining membership with such knowledge makes himself a party to the unlawful enterprise in which it is engaged."

After quoting this passage in its opinion in the first appeal of this case, the court below added,

> "The membership clause of the statute is, of course, nothing more nor less than a statute denouncing and making criminal a conspiracy to overthrow the government by force and violence. It is elementary that a conspiracy is a partnership in criminal purposes and that all are guilty who join it with knowledge of such purpose; and all that the statute does is apply

this fundamental concept of conspiracy to an organization having for its purpose the forcible overthrow of the government." 227 F. 2d 581, 587.

This position ignores crucial differences between speech, crimes and ordinary criminal conspiracies. In so doing, it violates fundamental constitutional principles. The ordinary criminal conspiracy has for its purpose the accomplishment of a single objective, be it bank robbery or espionage. The purpose is clearly criminal and there can be no ambiguity about the state of mind of one who knowingly participates in the common enterprise. On the other hand, the basic activity of a group engaged in advocacy—political speech—has a high social value, receives special protection under fundamental law and becomes criminal only under exceptional circumstances. Moreover, a revolutionary political group invariably has a complex program of social, economic and philosophical objectives, many of which are likely to bear no necessary relationship to the prohibited advocacy. It is a matter of common knowledge that such groups openly seek the support of persons of diverse views, using rhetoric drawn from many different political and social traditions. Whether we consider Marxism-Leninism, corporate fascism or home-grown racism, we are likely to find political programs which deal with many questions other than the desirability of violent overthrow. Thus, an individual may join a group which advocates violent overthrow in order to work for other parts of its program or he may join to make an effort to change that part of its platform. He may not, in fact, interpret its texts as advocating revolution. He may join at a time when the group's position is in doubt or in process of change towards or away from such advocacy. He may join at a time when external conditions are such that the forbidden advocacy presents no clear and present danger and, having done so, may have difficulty in predicting exactly when changed circumstances will lead a court to hold otherwise. Or he may join a group in order to discuss the doctrine of violent revolution without, however,

wishing to participate in any advocacy or other activity calculated to bring about such an objective.

In each of these cases guilty knowledge and intent could be found from evidence which points to no overt act other than that of joining. Because of the strong antogonism which revolutionary doctrine arouses in the community, the danger is great that such findings will be made with ease. The result will be suppression of political speech and association which realistically do not present any clear and present danger of an attempt to overthrow the government by force.

To legally assimilate group speech crimes to ordinary criminal conspiracies is to ignore the vital differences between them. To apply the harsh conspiracy rule of imputed guilt to the members of a radical political group is contrary to basic principles of fairness and political liberty. And, as pointed out above, requiring a guilty state of mind affords little, if any, protection against the dangers of unfairness which are inherent in a statute punishing membership.

The law which is shaped today in dealing with this Communist defendant may determine on some tomorrow whether we will face a repetition of the suppression which characterized many World War I Espionage Act prosecutions and post-World War I prosecutions under state syndicalism statutes. The clear and present danger test which grew out of these chapters of history was designed to provide some limiting principle in dealing with the power of government to punish speech which poses no significant threat to the community. In the *Dennis* case, that doctrine was expanded to permit, under some circumstances, the punishment of revolutionary advocacy even though no imminent threat from the defendants' teaching was demonstrated. The government argued that it should not be compelled to wait until the eve of an attempt.

However, in *Yates* v. *United States*, 354 U. S. 298, this Court limited the broad holding of *Dennis* so as to permit

a conviction only where there was proof of incitement to unlawful action. We suggest that if a conspiracy to advocate the violent overthrow of the government may not constitutionally be punished absent such incitement, then surely mere membership in an organization may not be punished despite proof that the defendant had knowledge that the organization did advocate the violent overthrow of the government.

The validation of convictions under the first federal statute which has sought to punish mere membership in groups advocating revolutionary doctrine, will have a damaging effect on the characteristically American habit of expressing political and social views by joining the countless groups of all types that dot our national scene.

It is appropriate to ask, therefore, what great interest is to be served by the tool which the government seeks permission to use. Whenever organized advocacy presents a significant threat, surely the requirement of charges and proof modeled on the *Dennis* and *Yates* cases does not impose an unfair burden on the government. Conversely, it is difficult to see how inability to punish membership involves such risk that fundamental principle should be sacrificed.

## CONCLUSION

**For the foregoing reasons, we urge that the judgments below be reversed.**

Respectfully submitted,

BERNARD WEISBERG,
231 So. La Salle Street,
Chicago 4, Illinois,

OSMOND K. FRAENKEL,
120 Broadway,
New York 5, New York,
*Counsel for American Civil Liberties Union, Amicus Curiae.*

ROWLAND WATTS,
*Of Counsel.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted]

JUNIUS IRVING SCALES,

*Petitioner,*

v.

UNITED STATES OF AMERICA.

## BRIEF FOR PETITIONER

TAYLOR, SCOLL & SIMON
400 Madison Avenue
New York 17, New York

SMITH, MOORE, SMITH, SCHELL & HUNTER
Jefferson Standard Building
Greensboro, North Carolina
*Attorneys for Appellant*

TELFORD TAYLOR,
McNEILL SMITH,
*Of Counsel.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

| | |
|---|---|
| JUNIUS IRVING SCALES, *Petitioner*, *v.* UNITED STATES OF AMERICA. | No. 488 |

## BRIEF FOR THE PETITIONER

### OPINION BELOW

The opinion of the court below (R. 455-95) is reported at 260 F. 2d 21. The opinion of the court below affirming the judgment of conviction after petitioner's first trial under this indictment is reported at 227 F. 2d 581, and the opinion of this Court reversing that judgment is reported at 355 U. S. 1.

### JURISDICTION

The judgment of the Court of Appeals (R. 495) was entered October 6, 1958. The petition for certiorari was filed November 3, 1958 and was granted December 15, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

### QUESTIONS PRESENTED

The Court of Appeals for the Fourth Circuit affirmed a judgment of the District Court of the United States for the Middle District of North Carolina, entered upon a jury

verdict under an indictment, finding the petitioner guilty under the so-called "membership clause" of the Smith Act (Act of June 28, 1940, 18 U. S. C. 2835), proscribing membership in any society, group or assembly of persons who teach, advocate, or encourage the overthrow or destruction of the Government of the United States by force or violence, with knowledge that the purposes of the group of persons are such. It is not disputed that the petitioner was a member of the Communist Party during the three-year period prior to the indictment. The questions are:

1. Whether the "membership clause" of the Smith Act is unconstitutional (a) on its face, or (b) as applied in this case;

2. Whether the indictment charges an offense under the laws of the United States, in view of Section 4(f) of the Internal Security Act of 1950 (50 U. S. C. 783 (f)), which provides that neither the holding of office nor membership in any Communist organization shall constitute *per se* a violation of that or any other criminal statute;

3. Whether the evidence was sufficient to support the judgment of conviction under the Smith Act in accordance with the standards prescribed in *Yates* v. *United States*, 354 U. S. 298 and other decisions of this Court; and

4. Whether petitioner was denied a fair trial by virtue of (a) the method of empanelling the grand jury, (b) the "Congressional findings" about the Communist Party in the Internal Security Act of 1950 (50 U. S. C. 781) and the Communist Control Act of 1954 (50 U. S. C. 841), (c) the denial of petitioner's request to examine the full texts of written statements furnished to the Federal Bureau of Investigation by prosecution witnesses, or (d) the erroneous admission of prejudicial evidence.

## STATUTES INVOLVED

The relevant provisions of the Constitution of the United States, the Smith Act, the Internal Security Act of 1950, the Communist Control Act of 1954 (50 U. S. C. 841), the Act of September 2, 1957 (18 U. S. C. 3500), and the federal statutes governing the qualifications and empanelling of jurors (28 U. S. C. 1861, 1864) are set forth in the Appendix *infra*, pp. 1a-9a.

## STATEMENT

The petitioner has not been accused or convicted of helping to organize the Communist Party, of advocating the overthrow of the United States Government by force and violence, or of conspiring for such purposes. He has not been accused or convicted of any *act* whatever, other than being (or, more accurately, not ceasing to be) a member of the Communist Party.

The indictment (R. A2),[1] returned November 18, 1954, charges that the Communist Party is and has since January 1946 been a group of persons who advocate overthrowing the United States Government by force and violence; that Junius Irving Scales is and has since January 1946 been a member of the Communist Party: that he knew the Party to be a group of persons who advocated violent overthrow; and that he intended "to bring about such overthrow by force and violence as speedily as circumstances would permit."

The petitioner was first tried in April 1955. He was found guilty and sentenced to imprisonment for six years. That judgment was affirmed by the Court of Appeals for

[1]References designated "R." are to the pages of the printed record herein; those designated "Tr." are to the trial transcript; and those designated "G. Ex." are to the Government's exhibits.

the Fourth Circuit in November 1955, 227 F. 2d 581. This Court granted certiorari, 350 U. S. 992, and heard argument on the constitutional and statutory questions in October 1956. In June 1957 this Court ordered the case restored to the docket for re-argument, 353 U. S. 979. On October 14, 1957, before the case was reached, the Court entered a further order, 355 U. S. 1, reversing the judgment on the authority of *Jencks* v. *United States*, 353 U. S. 657.[2]

After re-argument and denial of a motion to dismiss the indictment, the petitioner was tried again in February 1958. It was conceded by the prosecution, and the trial court so charged (R. A36), that Scales' conduct alleged as criminal had to be committed between November 18, 1951 and November 18, 1954, the three-year period preceding the indictment. It was acknowledged by Scales, and the trial judge so informed the jury (R. A41), that he was a member of the Communist Party within the statutory period.

The prosecution called as witnesses eight ex-Communists, of whom two were *bona fide* and six were Federal Bureau of Investigation informants. Five described Communist Party teachings and activities as known to them, but their testimony did not touch the appellant or Communist activities in the Carolinas. Three had known the appellant as a Party member in North Carolina.

In the former category, the most important witnesses were John Lautner and Barbara Hartle. Lautner, a paid consultant for the Department of Justice, had left the Communist Party in January 1950, nearly two years before the limitations period. He identified books and publications

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[2]This Court made the same disposition of a companion case from the Court of Appeals for the Seventh Circuit, *United States* v. *Lightfoot*, 355 U. S. 2, reversing 228 F. 2d 861. In September the Solicitor General had filed with the Court a memorandum in both the *Scales* and *Lightfoot* cases, confessing error under the *Jencks* case.

used in Communist Party schools, and testified that in such schools in New York City he was taught in 1930 and 1941, and he himself taught in 1947 and 1948, that the ultimate goal of the Communist Party in the United States was "to bring about a fundamental change in the economic, social and political structure of capitalism" (R. 105). He testified (R. 106) that this change "cannot be achieved peaceably" but "will come and can come as a result of force and violence on the part of wresting power [sic] from the capitalist class in this country."

Mrs. Hartle was a member of the Communist Party from 1933 to 1954. Between 1938 and 1946 she had attended two national Party conventions and a Party school in or near New York City, and she was a paid Party official in Seattle from 1940 to the middle of 1950. She testified that during that period she had taught and been taught that the ultimate goal of the Communist Party was "the dictatorship of the proletariat," and that this goal could only be attained "forcibly" (R. 230-31).

Both Lautner (R. 106-07) and Mrs. Hartle (R. 233-34) testified that they had taught and been taught that the Communist goal might be attained at an unspecified future time when the necessary "subjective and objective conditions" would be in existence. Three other witnesses who had joined the Communist Party as paid informants for the F. B. I. also testified about the teaching of the necessity of force and violence as a means of achieving the Party's objectives, as they had observed such teaching in Party schools in Chicago in 1945, in St. Louis in 1947, and in Los Angeles in March, 1951.

None of these five witnesses testified to any acquaintance or contact with or knowledge of the appellant, or to any knowledge of his or of any Party activities in the Carolinas. Most of this testimony was received over defense objection on the grounds of incompetence, irrelevance, and lack of

connection with the defendant. A motion to strike testimony of all these witnesses was denied (Tr. 1828).

The prosecution's leading witness from North Carol was one Clontz, who by pre-arrangement with the F. B made contact with Scales in 1948 and joined the Commu Party in 1950. Two of Clontz' conversations with Sc (R. 246-47 and 263-64) were heavily relied on by prosecution to show Scales' personal knowledge of Party's advocacy of force and violence. These talks all of Clontz' contacts with Scales took place before statutory period of limitations, as the two did not again after September, 1951 (R. 301 and Tr. 1128).

Clontz also identified several books and pamphlets ceived by him from Scales (R. A7-A14 and A18-A23; 310-13; Tr. 1794-1827; G. Exs. 64, 65, and 66) which demned American conduct of the war in Korea. The pro cution offered these documents to show Communist Pa incitement of action in an avowed effort (R. A11-13, A A24) to meet the requirement laid down by this Court the *Yates* case, *supra*. This evidence, some of it hig inflammatory (*infra*, pp. 65-66), was admitted over obj tion. extracts were read to the jury, and the ensuing fense motion for a mistrial was denied (R. A18-A23).

The prosecution witnesses Reavis and Childs were F. B. I. informants and members of the Communist Pa in North Carolina. Childs testified about his attenda at a week-long Party school session held in August, 19 near Winston-Salem, and described (R. 433-42) the va ous types of activity he was directed to engage in as a m ber of the Party, including writing letters to Senators, si ing petitions, distributing leaflets, and obtaining the "ing dients" for mimeographing. Neither Reavis nor Chi testified to any statement or act by Scales or in his prese indicating that Scales personally intended to overthrow Government by force and violence, that he knew the Part aims to be such, or that in fact they were such.

The petitioner did not testify. The defense called nine witnesses who knew Scales during the period when he was a member of the Communist Party, and who described some of his acts and statements during that time and testified in support of his character and conduct. These included two clergymen, a radio station employee, a professor at the University of North Carolina, a Greensboro businessman, a textile mill worker, the wife of a Superior Court judge, and the petitioner's mother and aunt. None of them had heard the petitioner advocate force and violence, and several testified to his statements and attitudes, heard by and known to them, which were inconsistent or incompatible with such advocacy.

In line with the *Yates* case, *supra*, the trial judge charged the jury (R. A38-A40) that the advocacy of force and violence punishable under the Smith Act is not mere advocacy of belief in violent overthrow of the Government, but must be advocacy of such a nature "as would reasonably and ordinarily be calculated to incite its [the Communist Party's] members to take concrete and forcible action for such overthrow . . ." However, the trial court refused to charge, as requested by the defense (R. A33), that the Smith Act does not prohibit incitement of action specifically protected by the Constitution, such as speeches, leaflets, petitions to public officials, and other recognized means of public persuasion, unless those means are used to advocate the violent and forcible overthrow of the Government. The trial judge also refused to charge (R. A33-34) that the jury could not find the defendant guilty if the activities incited by the Communist Party included *only* such recognized means of public persuasion. Thus the jury was left free to consider, as sufficient evidence of unlawful incitement, the literature dealing with the Korean War and other evidence which was highly prejudicial but wholly irrelevant to the issue of action-inciting advocacy of force and violence.

The jury found the petitioner guilty, and the trial judge again imposed a prison sentence of six years (R. A49).[3] Affirming the judgment of conviction, the Court of Appeals sustained the constitutionality and applicability of the membership clause (R. 456-63) on grounds similar to those invoked upon the previous appeal (227 F. 2d 581, 586-89). The court found no merit in the petitioner's other points, and rejected, expressly or *sub silentio*, his new contentions that the standard of proof of unlawful incitement prescribed in the *Yates* case had not been met, that the membership clause (assuming its intrinsic validity) had been unconstitutionally applied in this case, and that the indictment was fatally defective under the prosecution's new theory that the membership clause applies only to "active" membership.

## SUMMARY OF ARGUMENT

### I. On its Face, the Membership Clause of the Smith Act is Unconstitutional under the First and Fifth Amendments to the Constitution.

In *Dennis* v. *United States*, 341 U. S. 494, and *Yates* v. *United States*, 354 U. S. 298, this Court upheld the constitutionality of the "advocacy" and "organizing" provisions of the Smith Act in cases where the defendants were charged as conspirators. The Court found basis for this conclusion in the danger flowing from a conspiracy to use the Communist Party as an instrumentality to incite action directed to overthrowing the Government by force and violence. But the "membership clause" requires no proof that the defendant advocated or organized anything or con-

[3] Inasmuch as the maximum penalty for a conviction of conspiracy to violate the Smith Act was five years until the Act was amended in July 1956, Scales' sentence is heavier than has been imposed on any other Smith Act defendant.

spired with anyone. It purports to punish a mere status (membership) coupled with a state of mind (knowledge). Such a statute fails to meet the constitutional requirements enunciated in the *Dennis* and *Yates* cases, and was explicitly condemned by Mr. Justice Brandeis in his concurring opinion in *Whitney* v. *California*, 274 U. S. 357, 372-73, 379.

When this case was previously before the Court, the Solicitor-General substantially conceded (Supplemental Memorandum for the United States on Reargument, pp. 3-7) that the membership clause, as written, is unconstitutional. The Government's effort to salvage the clause by amendment, reading in an implied requirement of "activity," would render the clause unconstitutionally vague and is wholly untenable as a matter of statutory construction. The lower court (R. 459) upheld the clause by treating "membership" as identical with "conspiracy", an equation which is contrary to elementary principles of criminal law, and which makes the membership clause a redundant duplicate of the other provisions of the Smith Act.

**II. As Applied in this Case, the Membership Clause of the Smith Act is Unconstitutional under the First, Fifth and Sixth Amendments.**

In order to satisfy the "action-inciting" requirement stated in the *Yates* case (354 U. S. at 320), at the trial the Government offered books and pamphlets embodying violent attacks on American policy and conduct of the fighting in Korea in 1950. Although wholly unrelated to forcible overthrow of the Government, these documents were received by the trial court as evidence of unlawful incitement. Furthermore, over specific objection (R. A. 33-34), the trial judge left the jury free to consider such evidence *alone* as sufficient proof of incitement. The court below upheld (R. 481) the trial judge on the ground that documents

which tend to "stir up animosity against" the United States are admissible as evidence of unlawful advocacy. Such a view is unprecedented and untenable under the First Amendment and would render all contentious literature on national issues potential proof of seditious advocacy.

Although the indictment contains no such language, the trial judge, at the prosecution's request and over defense objection, charged the jury (R. 41) that the membership clause requires proof that the defendant was an "active" member of the Communist Party. If such a requirement is to be imported by implication in this case, the indictment is fatally defective under the Fifth and Sixth Amendments for lack of essential allegations. *United States* v. *Carll*, 105 U. S. 611. Likewise, the statute is thereby rendered so vague as to violate the Fifth Amendment.

**III. The Indictment Fails to State an Offense under the Laws of the United States.**

Prosecution of Communist Party members under the membership clause of the Smith Act is barred by Section 4(f) of the Internal Security Act of 1950, which provides that neither office-holding nor membership in any Communist organization "shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute." This provision was inserted in order to prevent the registration provisions of the Internal Security Act from being rendered invalid or nugatory by the Fifth Amendment's guarantee against compulsory self-incrimination. The legislative history of Section 4(f) makes it plain that Congress specifically intended to protect Communist Party members and officers against prosecution under the very clause of the Smith Act involved in this case.

The Government's attempted distinction (based on the expression "per se") between "mere membership" and

"membership with knowledge" is untenable. Membership in the Communits Party, without knowledge that the Party espouses violent overthrow, is not punishable under the Smith Act or any other federal statute. Therefore the Government's position makes meaningless surplusage of the phrase "or of any other criminal statute" in Section 4(f). Furthermore, the Government's argument leads to grotesque consequences under the Internal Security Act. If Section 4(f) protects against prosecution only Communists who do *not* know of any violent Party purposes, it would follow that any Communist having such knowledge could avoid compliance with the registration provisions under the privilege against self-incrimination. Whatever may ultimately be held to be the legal effect of Section 4(f), its purpose would be entirely frustrated if construed so narrowly as the Government suggests.

**IV. The Evidence is Insufficient to Support Petitioner's Conviction under the Smith Act.**

In the *Yates* case, this Court found (354 U. S. at 329) the evidence insufficient to establish that the Communist Party advocated forcible overthrow of the Government in an action-inciting way. Such proof is a necessary element of guilt under the membership clause, as the trial judge properly charged (R. A41). Nevertheless, the prosecution's evidence about the Communist Party was substantially identical with the evidence offered in the *Yates* case (R. A25-A32). The court below wholly ignored this Court's analysis of the evidence about the Communist Party in the *Yates* case and the conclusory summation of the evidence about the Communist Party in the opinion below (R. 477-79) refers to nothing that was not present and relied on by the prosecution in the *Yates* case.

For the requisite proof of the petitioner's unlawful state of mind, the court below relied principally (R. 473-

75) on a few statements made by the petitioner to one of the F. B. I. informant-witnesses in 1949 and 1950, long prior to the limitations period. The statements strongly resemble those held insufficient, as proof of unlawful advocacy, in *Nowak* v. *United States*, 356 U. S. 660, 665-68, and *Maisenberg* v. *United States*, 356 U. S. 670, 672-73. Additionally, the court below relied (R. 478-79) on evidence of the petitioner's general Party activities; under the *Yates* case (354 U. S. at 330) such evidence is insufficient as proof of guilt under the Smith Act.

## V. The Petitioner was Denied a Fair Trial.

(A) The grand jury was illegally impanelled. It was never determined whether or not the jury box contained the names of 300 qualified persons, as the statute (28 U. S. C. 1864) requires. *United States* v. *Silverman*, 129 F. Supp. 496. The court clerks and the jury commissioner illegally delegated their duty to select qualified jurors fairly representative of the community. *Glasser* v. *United States*, 315 U. S. 60; *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217; see *Ballard* v. *United States*, 329 U. S. 187, 195. (B) The "Congressional findings" in the Communist Control Act of 1954 (50 U. S. C. 841) and the Internal Security Act of 1950 (50 U. S. C. 781) deprived Scales of the opportunity for a fair and impartial trial on the issue of the Communist Party's violent or non-violent aims. In the face of the Congressional "findings" that the Party contemplates resort to force and violence, no jury could determine this question on the basis of an independent and objective scrutiny of the evidence offered in this case. *Cf. Delaney* v. *United States*, 199 F. 2d 107, 112. (C) The trial court denied the petitioner's request to examine the full texts of statements made to agents of the Government by prosecution witnesses. Portions of such statements were withheld

following their examination by the trial judge *in camera*, in accordance with the provisions of Public Law 85-269 (18 U. S. C. 3500), enacted after this Court's decision in *Jencks* v. *United States*, 353 U. S. 657. Under the principles stated in that decision, however, the excision of these portions was a denial of due process. The provisions of 18 U. S. C. 3500 violate the Fifth Amendment in other respects, and their application in the present case violated the Constitutional ban on *ex post facto* legislation. (D) There was highly prejudicial error in the admission of incompetent, irrelevant, remote and inflammatory evidence. The trial was conducted on the apparent assumption that anything ever said or written by any member of the Communist Party was admissible against the petitioner. The entire first half (7 days) of the trial passed before the defendant's name was even mentioned (Tr. 961). The documents (G. Exs. 64, 65 and 66) relating to the Korean War were not only irrelevant to the issues in the case, but highly inflammatory. There was a vast amount of other irrelevant and prejudicial evidence, especially that concerned with the Communist Party doctrine of the so-called "Black Belt" of concentrated Negro population in the South. The trial judge's discretion with respect to the order and scope of proof was abused to a degree that hopelessly prejudiced the petitioner.

## ARGUMENT

This case was the first under the "membership clause" to reach this Court. Two of the questions then presented —the constitutionality of the clause and the effect of Section 4 (f) of the Internal Security Act—are inherent in any prosecution under this provision of the Smith Act. In reviewing petitioner's first conviction the Court left these issues unresolved, and they are now presented in this

and at least fourteen other cases pending here[4] and in the lower federal courts.[5]

The defendants in *Dennis* v. *United States*, 341 U. S. 494, were indicted under the membership clause as well as for the conspiracy of which they were convicted. None of them has been tried under the membership indictments, but these have not been dismissed, despite the lapse of ten years.[6] Following the *Dennis* case, there was a series of Smith Act prosecutions, of which two were completed prior to this Court's decision in the *Yates* case. After that decision most of the other conspiracy indictments were dismissed, either by court order or by voluntary action of the government,[8] but one of those cases is now on retrial in Colorado.[9]

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[4]*United States* v. *Noto*, No. 564 Misc., petition for cert. to the Court of Appeals for the Second Circuit filed January 23, 1959.

[5]*United States* v. *Hellman*, pending in the Court of Appeals for the Ninth Circuit; *United States* v. *Lightfoot*, calendered for retrial as No. 54-CR262, N. D. Ill. E. D.; *United States* v. *Blumberg*, pending on motion for new trial, E. D. Pa.; *United States* v. *Russo*, D. Mass.; *United States* v. *Weiss*, N. D. Ill. The other eight cases are those mentioned in footnote 6, *infra*.

[6]The membership indictment against Eugene Dennis is No. C128/89 (S. D. N. Y.), and the other membership indictments are against Winter, Gates, Davis, Hall, Thompson, Foster and Stachel. See *United States* v. *Foster*, 80 F. Supp. 479 (S. D. N. Y. 1948).

[7]*United States* v. *Flynn*, 216 F. 2d 354 (C. A. 2), *cert. den.* 348 U. S. 909; *Frankfeld* v. *United States*, 198 F. 2d 679 (C. A. 4), *cert. den.* 344 U. S. 922.

[8]The indictments dismissed by court action include *Fujimoto* v. *United States* and *Huff* v. *United States*, 251 F. 2d 342 (C. A. 9); *United States* v. *Silverman*, 248 F. 2d 671 (C. A. 2); *United States* v. *Jackson*, 257 F. 2d 830 (C. A. 2). Indictments dismissed by voluntary action of the government include *United States* v. *Mesarosh*, 352 U. S. 1; *Sentner* v. *United States*, 253 F. 2d 310 (C. A. 8); *Wellman* v. *United States*, 253 F. 2d 601 (C. A. 6). Indictments were dismissed by both court order and voluntary action of the government in the *Yates* case and in *United States* v. *Kuzma*, 249 F. 2d 619 (C. A. 3).

[9]*Bary* v. *United States*, 248 F. 2d 201 (C. A. 10).

The instant case is one of seven prosecutions[10] under the membership clause instituted by the government since 1953. The case returns here with new issues, and old ones sharpened, as a result of the prosecution's attempt to meet the standards of essential proof under the Smith Act as set forth by this Court in the *Yates* case.

## I.

## ON ITS FACE, THE MEMBERSHIP CLAUSE OF THE SMITH ACT IS UNCONSTITUTIONAL UNDER THE FIRST AND FIFTH AMENDMENTS.

As a matter of judicial policy, this Court does not decide constitutional questions unless the posture of other issues in a particular case requires that the constitutional question be confronted. *Peters* v. *Hobby*, 349 U. S. 331; *United States* v. *Rumely*, 345 U. S. 41. In the present case, there are important non-constitutional issues the disposition of which, the petitioner believes, will in any event require reversal of the decision below and direction of a judgment of acquittal or dismissal of the indictment. But the constitutional and non-constitutional problems overlap, and the case can perhaps be most clearly presented by starting with the background and legal characteristics of the membership clause, and the constitutional questions it raises.

### A. Historical Background of the Membership Clause

"Guilt is personal", but to say this is to state the problem, not to answer it. The law has long grappled with the question of what degree of association with a crime is sufficient to establish that the individual so associated may fairly be charged with guilt. Out of this enduring prob-

[10]These are the six cases cited in notes 4 and 5 *supra*, and *United States* v. *Blum* (S. D. Ind.), in which the indictment was dismissed before trial.

lem have developed the legal principles relating to principals and accessories, felony murders, attempts, and conspiracies.

This case involves the associative concept of "membership", familiar in the field of corporations, trade unions, and other aspects of civil law and litigation. But as a criminal concept it is unknown to the common law, and only rarely and in times of great political or economic stress have legislatures undertaken to attach criminal consequences to membership in a group, without reference to some act or concert for purposes of action, such as conspiracy, upon which criminal liability has always depended. Thus in 1799, when Britain was wracked by the Napoleonic wars as well as by the reform movement and other political crises, Parliament enacted the Unlawful Societies Act,[11] which condemned certain societies by name,[12] as dangerous to "the existence of regular government", and provided that "every person who . . . shall become a member of any such society . . . shall be deemed guilty of an unlawful combination and confederacy."

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[11]39 Geo. 3 c. 79. This statute had been preceded in 1797 by the Unlawful Oaths Act, 37 Geo. 3 c. 123, which proscribed the formation of societies bound by oaths of secrecy. The 1799 statute was closely linked in mutual influence and stimulus with our own Alien and Sedition Acts. See Dauer, *The Adams Federalists* (1953) pp. 157-59; J. M. Smith, *Freedom's Fetters* (1956) p. 67.

[12]The preamble to The Unlawful Societies Act embodies a Parliamentary "finding", not unlike the Congressional findings in the Communist Control Act (50 U. S. C. 841) and the Internal Security Act (50 U. S. C. 781), of the existence of "a traitorous conspiracy . . . in conjunction with the persons from time to time exercising the powers of government in France, to overturn the laws, constitution and government . . . both in Great Britain and Ireland, and to dissolve the connection between the two kingdoms", and of "divers societies of a new and dangerous nature, inconsistent with publick tranquillity and with the existence of regular government, particularly certain societies calling themselves Societies of United Englishmen, United Scotsmen, United Britons, United Irishmen, and the London Corresponding Society . . ." which it was the purpose of the Act to suppress.

Another British statute containing a similar provision, enacted in 1817, was directed against societies bound by oaths of secrecy.[13] Apparently prosecutions under these enactments were very infrequent, although as late as 1834 they were invoked against societies of workingmen such as those from which the trade unions were developing.[14] At all events when, a century later, the paramilitary activities of Sir Oswald Moseley's uniformed adherents assumed proportions thought to be dangerous, Parliament's remedial legislation did not undertake to punish membership in the Moseley organization.[15]

In the United States, "membership" as the basis for penal sanctions first assumed importance with the enactment, early in this century, of numerous state statutes punishing "criminal anarchy" and "criminal syndicalism". The New York statute of 1909,[16] sustained by this Court in *Gitlow* v. *New York*, 268 U. S. 652, contains a provision (not involved in the *Gitlow* case) punishing any person who "organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group, or assembly of persons formed to advocate" criminal anarchy. The criminal syndicalism and related state statutes passed immediately following the First World War also commonly con-

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[13]The Seditious Meetings Act, 57 Geo. 3 c. 19.

[14]*Rex* v. *Lovelass*, 6 Carr. & Payne 596; *Rex* v. *Dixon*, 6 Carr. & Payne 601 (involving the Cordwainer's Union of Cambridge). Both are *nisi prius* decisions, the first under The Unlawful Oaths Act of 1797 and the latter under The Seditious Meetings Act of 1817. No reported cases under The Unlawful Societies Act of 1799 have been found.

[15]The Public Order Act, 1936, 1 Edw. 8 & 1 Geo. 6 c. 6, prohibits quasi-military organizations that organize and train to use force for the achievement of political ends. It is made a criminal offense to take part in the control or management of any such organization, or in the training of its members, but the accused is allowed to show as a defense that "he neither consented to nor connived at the organization ... in contravention of the provisions of this section."

[16]Laws 1909, c. 88, now sections 160-66 of the Penal Law.

tained clauses specifically directed against being or becoming a member of any group or organization espousing the teachings against which the statutes were directed.[17]

The California criminal syndicalism statute[18] came before this Court in *Burns* v. *United States*, 274 U. S. 328 and *Whitney* v. *California*, 274 U. S. 357, and the Kansas statute in *Fiske* v. *Kansas*, 274 U. S. 380. As applied to the facts of each case, the California law was held constitutional and the Kansas Law unconstitutional. None of the three is governing here, because (although both laws punish membership in an organization advocating criminal syndicalism) none of the defendants was indicted for membership alone, but also for organizing the group in question.[19] In the *Whitney* case, however, Justice Brandeis (in whose opinion[20] Justice Holmes concurred) noted the extraordinary reach of the California statute's membership clause, questioned its constitutional validity, and concurred in the Court's decision only because the defendant had not raised the "clear and present danger" question in the state court, and because there was evidence linking the defendant not only with syndicalist doctrine but also with "a conspiracy . . . to commit present serious crimes."[21]

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[17]See, e.g., the statutes involved in *People* v. *Steelik*, 187 Cal. 361, 203 Pac. 78 (1921); *State* v. *Dingman*, 37 Ida. 253, 219 Pac. 760 (1923); *People* v. *Lloyd*, 304 Ill. 23, 136 N. E. 505 (1922); *State* v. *Tonn*, 195 Ia. 94, 191 N. W. 530 (1923); *State* v. *Berquist*, 109 Kan. 368, 199 Pac. 101 (1921); *State* v. *Laundy*, 103 Ore. 443, 204 Pac. 958 (1922); *Commonwealth* v. *Blankenstein*, 81 Pa. Sup. Ct. 340 (1923); *State* v. *Hennessey*, 114 Wash. 351, 195 Pac. 211 (1921). In a few of these decisions the membership clause as distinguished from the more orthodox provisions, was considered and upheld. *State* v. *Hennessey, supra; State* v. *Laundy, supra.* In others its validity was doubted. *People* v. *Lloyd, supra, State* v. *Tonn, supra.*

[18]California Statutes 1919, c. 188, Deering's Penal Code (1949), pp. 773-74.

[19]In both the *Fiske* and *Burns* cases the group was the Industrial Workers of the World; in the *Whitney* case it was the Communist Labor Party of California.

[20]*See Whitney* v. *California, supra,* at pp. 372-80.

[21]*Id.*, at 379-80. See also the *Dennis* case at pp. 513-14.

The similarity between the Smith Act and the New York criminal anarchy statute was noted in the *Dennis* case,[22] and it may reasonably be assumed[23] that the inclusion of the membership clause in the Smith Act is due to the presence of comparable clauses in the state statutes that antedated it by twenty to thirty years. However, there is one significant respect in which the Smith Act clause differs from its New York state predecessor, for the former alone requires knowledge of the Party's unlawful purposes as an element of the offense[24]—a provision added by a Senate amendment to the original bill, which did not require such knowledge.[25]

**B. Constitutional Limits on the Scope of the Smith Act**

The Smith Act proscribes advocacy of overthrowing the Government by force or violence whether by personal exhortation, printing and disseminating literature, or organizing or joining groups engaging in such advocacy. In the *Dennis* case, this Court upheld the constitutionality of the advocating and organizing provisions, subject to specific limitations laid down in the Court's opinion as necessary to sustain the constitutionality of the Act under the First Amendment.

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[22]See the *Dennis* case at pp. 536 and 562, n. 2.

[23]The legislative history of the Smith Act is silent on the source of the membership clause.

[24]In this respect the Smith Act membership clause resembles the California criminal syndicalism law, which specifies "knowingly" as an element of criminal membership, and differs from the Iowa, Washington, and Oregon statutes, which do not. See the *Laundy* and *Hennessey* cases, *supra*, note 17.

[25]H. R. 5138 (76 Cong., 1st sess.). This bill, introduced by Representative Howard Smith of Virginia, was passed by the House on July 29, 1939 (84 Cong. Rec. 10451-56). It was redrawn in the Senate Committee on the Judiciary, and as amended (with the requirement of knowledge added to the membership clause) it passed the Senate on June 15, 1940 (86 Cong. Rec. 8340-47). The bill was enacted into law as amended.

All of the opinions in the *Dennis* case, including Judge Learned Hand's opinion below[26], are pregnant with awareness that the case presented a problem quite different from what was involved in the *Schenck, Gitlow,* and other free speech cases of the post-World War I years. On the one hand imminent (i.e. "present") peril of violent overthrow of the government (the "substantive evil") was, on the record in the *Dennis* case, totally unproved. On the other hand the potential ultimate (i.e. "clear") danger of such overthrow was inferred from the Communist Party's doctrine, leadership, organization, and activities both in the United States and abroad.

The clear and present danger in the *Dennis* case was not the conspiratorial activities, standing alone, of the handful of defendants. Nor was it the Communist Party itself, which was not even under indictment. The danger in the *Dennis* case was the conspiracy of the defendants to advocate and bring about violent overthrow of our Government through and by means of the Communist Party. It was the defendants' concerted and violent objectives *coupled with* the potent instrumentality utilized for their achievement, that was the basis of Judge Medina's finding (approved by both the Court of Appeals and this Court)[27] that "there is sufficient danger of a substantive evil that the Congress has a right to prevent to justify the application of the statute under the First Amendment of the Constitution."

In Smith Act conspiracy prosecutions, therefore, the impact of the "clear and present danger" rule is to require a *nexus* between the conspirators' violent intent and an instrumentality proportioned to the magnitude of the objective. Conspiracies to obstruct the draft or impede war production may achieve their purpose, at least in part, with

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[26] *United States* v. *Dennis,* 183 F. 2d 201.

[27] See 182 F. 2d at 215-216 and 341 U. S. at 511-515.

relatively modest means. But overthrowing the United States Government is no job for boys. Unless conspirators to this end have laid hold of some engine or organization powerful enough to give cause for alarm under Judge Learned Hand's restatement of Justice Holmes' rule,[28] their conspiracy to adocate force and violence is not constitutionally punishable under the Smith Act.

In the free speech cases under the Espionage Act it was quite clear that the defendants were directly and personally responsible for whatever degree of danger had been caused. For example, when Eugene V. Debs made a speech praising those who violated the military draft laws, the danger of the "substantive evil" was directly traceable to Debs, and the only question was whether it was "present" enough. Since even a single speech might "bring about the substantive evil" of obstructing military service, Deb's conviction was upheld. *Debs* v. *United States*, 249 U. S. 211.

But if Debs (or Schenck or Gitlow) had made a speech advocating that the Government be overthrown by force, under the *Dennis* case there would have been no constitutionally punishable offense, because (in Chief Justice Vinson's phrase, 341 U. S. at 516) there would have been no "power to bring about the evil" of violent overthrow.[29] Indeed, it is hard to see how (short of war) this particular "substantive evil" can become a "clear and present danger" unless by an organization, such as the Communist Party, of such ideological and numerical dimensions that it merits description as a "movement".

Thus the Smith Act Communist prosecutions are the exact converse of the *Debs* case. There the personal respon-

[28]See 341 U. S. at 510 and 183 F. 2d at 212.

[29]See also Justice Frankfurter's concurring opinion in the *Dennis* case at p. 542: "Our decision today certainly does not mean that the Smith Act can constitutionally be applied to facts like those in *Gitlow* v. *New York*".

sibility is plain, but the limited power of evil is sufficient to create a danger only if the objective is a relatively narrow one. In the Smith Act cases the Communist Party (if there is judicially satisfactory proof) supplies the power to create the danger of violent overthrow, and the question of personal responsibility at once emerges as the crucial issue.

It is in the light of these considerations that the factors specified in the *Dennis* case, as constitutionally necessary elements of guilt under the Smith Act, must be viewed. These elements are not haphazard; on the contrary, they sharply reflect the real problems of national security, personal liberty, and individual responsibility that necessarily attach to prosecutions of Communists under our constitutional system. There are three specific requirements stated in the *Dennis* case which bear on the constitutionality of the membership clause.

(1) *Conspiratorial Power.* In view of immensity of the "substantive evil" against which the Smith Act is directed, it is absurd to think of a "clear and present danger" caused by an individual. Governments are not overthrown by individuals, but by conspiracies, juntas, and movements. "It is the existence of the conspiracy which creates the danger", as Chief Justice Vinson wrote in the *Dennis* case (at p. 511), while Justice Jackson observed (at p. 577): "There is no constitutional right to 'gang up' on the Government." It is the conjunction of the conspiracy to destroy the government with the strong instrumentality of the Communist Party (assuming that the Party's similar purpose has been established) that constitutes the clear and present danger, as all of the majority opinions in the *Dennis* case (341 U. S. at 498, 511, 546-48, 564-66) make clear.

To support a Smith Act conviction of Communists therefore, the accused must be shown to have been so connected with the Party that they could exploit its power to

bring about the "substantive evil" of violent overthrow. Guilty activity in and through the Party must, as was ruled in the *Dennis* case (at p. 516), be such as to establish not only the defendants' evil intent but also that "the nature of their activities" and "their power to bring about the evil" are so great as to justify a determination that their conspiracy created a "clear and present danger" to national security.

(2) *Incitement.* The substantive offense punished by the Smith Act is not discussion, but advocacy of action. In the *Dennis* case, the Court showed great concern (341 U. S. at 501-02, 544-46, and 572) that the Act be not construed to penalize the exposition and analysis of ideas, however unpopular, and Justice Frankfurter noted (341 U. S. at 545) that: "Throughout our decisions there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken." At the trial, Judge Medina instructed the jury to determine whether the defendants conspired to advocate violent overthrow "by language reasonably and ordinarily calculated to incite persons to such action." In the *Yates* case where no such instruction had been given, the Court, in order to avoid (354 U. S. at 319) "a constitutional danger zone so clearly marked", construed the Smith Act as limited to advocacy which incites the hearer to take action—"to *do* something, now or in the future, rather than merely to *believe* in something"— directed toward the violent overthrow of the government.

(3) *Personal Intent to Overthrow the Government.* This was likewise specified in the *Dennis* case (341 U. S. at 499-500 and 516) as a constitutional element of Smith Act guilt. Furthermore, the intent is insufficient if it relates to the indefinite future; under the *Dennis* case (341 U. S. at 511-12) it must be an intent to overthrow the government "as speedily as circumstances would permit."

It is perhaps only theoretically possible that an individual Communist might intend to overthrow the Government but remain ignorant of the Party's program. But it is both theoretically possible and practically certain that one—indeed many—who know the Party program may lack the specific intent. The undercover agent who joins the Party to report its personnel and activities to the Government presumably knows the Party's illegal purposes, but lacks intent. The individual who joins the Party because he believes it to be an effective avenue for the achievement of some socio-economic goal such as unionization or the abolition of racial restrictions, may be entirely lacking in violent or unlawful intent of any kind, whether or not he knows of the Party leadership's subversive purposes.

### C. Constitutional Deficiency of the Membership Clause Under the First and Fifth Amendments

The constitutionality of the membership clause on its face must be determined on the basis of the clause and what is charged in the indictment, not the proof offered thereunder. For all that apears from the indictment under which Scales was convicted, he never met another member of the Communist Party, much less discussed or plotted the violent overthrow of our Government with any other members. There is no charge that he ever heard anyone advocate the overthrow of the Government, much less that he himself ever engaged in such advocacy. There is no charge that he ever engaged in any Party activity.

No concert of action or intention with any other person is charged against Scales. Indeed, no act of any kind whatsoever is charged; the accusation is purely one of status (membership) and state of mind. There is no charge that Scales, alone or in collaboration with any one else, ever planned or contemplated that violent overthrow would be advocated by anyone; *a fortiori* the indictment does not

charge that such advocacy would be in language calculated to incite other persons to unlawful action.

In short, the indictment charges nothing more than a state of mind comprising knowledge and intent,[30] manifested in the external world by nothing more than non-conspiratorial membership in the Communist Party, unsupported by any charge of Party contacts or activities. "The thought of man shall not be tried," said Chief Justice Brian in Y. B. 7 Edw. IV, f. 2, pl. 2, "for the devil himself knoweth not the thought of man." It is too plain for argument that such a charge wholly fails to satisfy the requirements stated in the *Dennis* case, and violates the First Amendment of the Constitution.

During argument when this case was last here, question was raised from the bench concerning the bearing of *Bryant* v. *Zimmerman*, 278 U. S. 63. That case involved a New York statute requiring associations, in which the taking of an oath is a condition of membership, to file reports with the Secretary of State. The statute makes it a misdemeanor to remain a member of such a society with knowledge that it has failed to file reports required by the law.

The *Bryant* decision does not support the constitutionality of the membership clause. The statute there in ques-

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[30]The membership clause does not specify intent as an element of the offense, but intent is charged in the indictment here. Of course, if the membership clause is constitutionally defective for this reason the defect cannot be cured by adding a superfluous allegation to the indictment. *Thornhill* v. *Alabama*, 318 U. S. 88. Inasmuch as Congress amended the bill that became the membership clause by adding a requirement of knowledge, but did not add a requirement of intent, it is at least doubtful that intent may be read by implication into that clause. In the *Dennis* case it was held (341 U. S. at 499-500) that the inherent nature of advocating or organizing for the violent overthrow of government is such as to require "the inclusion of intent as an element of the crime" even if not so specified in the statute. But this is not true of membership, which may be of an entirely passive nature involving no action from which intent might reasonably be inferred. However, even if intent were to be read by implication into the membership clause, its constitutionality would not thereby be saved.

tion does not suppress or penalize membership in the societies to which the law applies. It is a registration measure, and its only sanctions are directed not at membership, but at failure to register. The principal issue raised by the *Bryant* case was the reasonableness of the statutory classification.[31] Societies bound by secret oaths have in the past been the subject of regulatory legislation,[32] and on this basis the law was upheld. But the Smith Act and its comparable state predecessors undertake to punish membership itself, and it is noteworthy that earlier efforts directed to this end failed.[33]

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[31]The New York statute, enacted in 1923, was directed at the Ku Klux Klan. The *Bryant* case was recently discussed in *N. A. A. C. P. v. Alabama*, 357 U. S. 449, 465-66.

[32]*Cf.* the British statute of 1817, *supra* p. 17. In the United States, in addition to the Klan, the Masons have been the main object of legislative scrutiny. See McCarthy, *The Anti-Masonic Party: A Study of Political Anti-Masonry in the United States 1827-1840*, in the Annual Report for 1902 of the American Historical Association, vol. I, p. 365. In 1833 and 1834 respectively, Vermont and Massachusetts passed laws prohibiting any person from taking or administering any oath other than as required or authorized by law. Vermont Public Acts 1833 c. 20; Laws of Massachusetts 1834; *cf. Strickland* v. *Prichard*, 37 Vt. 324 (1863).

[33]According to McCarthy, *op. cit. supra* note 32 at pp. 513-53, the anti-Masonic bills introduced in Vermont, Massachusetts, and Rhode Island were prohibitory and far more drastic than the laws as enacted. In Pennsylvania, Thaddeus Stevens in December 1835 reported a bill to the legislature entitled "An Act to Suppress Secret Societies Bound Together by Unlawful Oaths". McCarthy, *supra*, p. 473; Woodbine, *The Life of Thaddeus Stevens* (1913) pp. 22-25. In response to Stevens' inquiries to the then leading presidential aspirants, Daniel Webster approved a prohibition of secret oaths. But William Henry Harrison, while acknowledging that Masonry might be "a proper subject for the deliberation and action of some of the constituted authorities of our country", rejected the proposed prohibitory legislation, saying that he was "certain that there exists no such power either in the whole government of the United States or of any of its departments, and that the attempt to exercise it would constitute a usurpation of power, pregnant, if tolerated by the people, with mischiefs infinitely more fatal than those which it was intended to remedy." McCarthy, *supra*, pp. 473-79; *The Pennsylvania Reporter and Democratic Herald* (Harrisburg, Jan. 8, 1836) p. 2 col. 2. Stevens' bill failed of enactment by the Pennsylvania legislature.

In weighing the constitutionality of the membership clause, the Fifth Amendment must be considered as well as the First. No more than many others is the phrase "guilt by association" self-defining, but it is not meaningless. Its meaning is not abstruse: a man may be held criminally liable only for his own conduct, or for the conduct of others in some form of concert or combination which is recognized by our law as warranting holding an individual participant responsible for the acts of other participants. "Membership" is not such a recognized combination. Joint participation in a felony is, and so is conspiracy. But courts and legislatures alike have remained awake to the dangers of injustice that surround imputed guilt, and have erected a variety of safeguards against oppressive consequences.

To attach criminal consequence to "membership", unaccompanied by act or declarations that might bring the charge within the ambit of associative concepts known to our law, would so far extend the notion of imputed guilt as plainly to violate the due process clause of the Fifth Amendment[34] and, in the circumstances of this case, the First Amendment as well. The "dangers to the liberty of the individuals and the integrity of the judicial processes that are inherent in conspiracy charges" were strongly delineated by the late Justice Jackson, concurring in *Krulewitch* v. *United States*, 336 U. S. 440, at 457. But at least the dangers of the conspiracy concept are known to and limited by judicial practice.

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[34] John Lord O'Brian, *National Security and Individual Freedom* (1955), at p. 27-28:

> "The Smith Act of 1940 *made it unlawful* for any person to be or to become a member of or affiliate with any society, group, or assembly which teaches, advocates, or encourages the overthrow or destruction of any government in the United States by force or violence. These statutes, therefore, imported into our law the alien doctrine of guilt by association, which up to this time had been regarded as abhorrent and which had never been recognized either by the courts or by the Department of Justice, even during the perils and excitements of the First World War."

In essence, the membership clause seeks to hold a "member" of a group criminally liable for the group's "advocacy," whether or not the member participated in the advocacy. A co-conspirator or joint participant in a felony may be held liable for the acts of others, but it has not yet been held under our Constitution that "membership" is a form of association which warrants holding one member criminally responsible for the acts of others. Such a statute is a flagrant abridgement of freedom of speech and assembly, denies due process of law by the unwarranted imputation of guilt, and is void by every criterion of the First and Fifth Amendments.

The court below sustained the constitutionality of the membership clause by resorting to alchemy (R. 459): "The membership clause is of course nothing more nor less than a statute denouncing and making criminal a conspiracy to overthrow the government by force and violence." But the clause is both more and less than, and very different from, a statute so described.[35]

In a conspiracy case, the conspirators (two or more)[35a] must be identified, and the prosecution must prove an agreement among them "to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy". *United States* v. *Falcone*, 311 U. S. 205, 210. Assistance and support even to those known to be engaged in crime does not establish conspiracy with them.

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[35]Apart from the matters mentioned in the text, neither the membership clause nor any other part of the Smith Act proscribes "a conspiracy to overthrow the government" (an offense covered by a statute nearly a century old, now 18 U. S. C. 2384), but rather *advocacy* of governmental overthrow, whether orally or by the printed word. More important, the lower court's treatment of the membership clause renders it indistinguishable from the other provisions of the Smith Act, and therefore cannot possibly be sustained on elementary principles of statutory construction.

[35a]*United States* v. *Rabinowich*, 238 U. S. 78, 88; Pulton, *De Pace Regis et Regni* (London, 1615) pp. 232-33. Under the federal conspiracy statute, overt acts must also be charged in the indictment.

lacking any agreement to pursue the unlawful ends. *United States* v. *Falcone, supra; Butler* v. *United States,* 197 F. 2d 561 (C. A. 10). Nor does unlawful intent satisfy the requirements, for:[36]

> "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself. . . ."

But the charge against Scales covers no agreement or plot of any kind. It rests solely on knowledge and intent (assuming that intent is read into the clause).[37] In a conspiracy there must be evidence of affirmative conduct by the defendant in aid of the criminal agreement among the parties—what Justice Rutledge called "informed and interested cooperation, stimulation, instigation." See *Direct Sales Co.* v. *United States,* 319 U. S. 703, 713. As Judge Learned Hand has put it, a conspirator "must in some sense promote . . . [the] venture himself, make it his own, have a stake in its outcome." *United States* v. *Falcone,* 109 F. 2d 579, 581 (C. C. A. 2); see also *United States* v. *American Precision Products Corp.,* 115 F. Supp. 823, 826 (D. N. J.). But nothing like this has been charged against Scales.

It is true that in the opinion of this Court in *Whitney* v. *California,* 274 U. S. 357, 371-72 the California criminal syndicalism statute, proscribing membership in or the organization of such groups, was described as partaking "of the nature of a criminal conspiracy." But the defendant in the *Whitney* case was not, as is the petitioner here, indicted for membership alone. In Mr. Justice Brandeis' concurring opinion (in which Mr. Justice Holmes joined)

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[36] *Mulcahy* v. *Regina,* L. R. 3 H. of L. 306, 317 (1868).
[37] *Supra,* p. 25, note 30.

it is pointed out (274 U. S. at 379) that the defendant there had failed to challenge the California statute under the "clear and present danger" test, and that there was evidence linking her with "a conspiracy . . . to commit present serious crimes" quite distinct from advocacy. Justice Brandeis went on to point out the difference between a "membership" charge and a "conspiracy" charge, and indicated that, if the constitutional issue were properly raised, the California "membership" clause should be held void[38] (274 U. S. at 372-73, 379):

> "The felony which the statute created is a crime very unlike the old felony of conspiracy or the old misdemeanor of unlawful assembly. The mere act of assisting in forming a society for teaching syndicalism, of becoming a member of it, or of assembling with others for that purpose is given the dynamic quality of crime. There is guilt although the society may not contemplate immediate promulgation of the doctrine. Thus the accused is to be punished, not for contempt, incitement or conspiracy, but for a step in preparation, which, if it threatens the public order at all, does so only remotely. The novelty in the prohibition introduced is that the statute aims, not at the practice of criminal syndicalism, nor even directly at the preaching of it, but at association with those who propose to preach it.
>
> ". . . I am unable to assent to the suggestion in the opinion of the Court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment . . ."

The view taken below is equally untenable as a matter of statutory construction. If membership is indeed "noth-

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[38] *Cf.* the line of cases invalidating state statutes such as one which undertook to punish "associating with persons having the reputation of being thieves, burglars, pickpockets, pigeon droppers and gamblers . . .". *The City of St. Louis* v. *Roche*, 128 Mo. 541, 31 S. W. 915; *Ex parte Smith*, 135 Mo. 223, 36 S. W. 628.

ing more or less than" conspiracy, then the membership clause adds nothing to the other provisions of the Smith Act. Under elementary principles, statutory provisions should not be construed so as to render them redundant duplicates of others. The result in the present case has been to use the membership clause as a device for convicting Scales of conspiracy without meeting the established requirements of that offense.

The same vice of redundancy inheres in the Government's efforts to salvage the unconstitutionality of the clause by judicial amendment. At no time has the prosecution even attempted to apply the clause, as written. For the indictment itself adds the charge of personal intent, which the statutory language does not embrace. But even assuming that intent may rightly be read into the clause by implication,[39] the other constitutional requirements set forth in the *Dennis* and *Yates* cases are still lacking.

When this case was previously before the Court, the Solicitor General substantially conceded that the clause as drawn is unconstitutional, and he sought to support it by dint of drastic qualifications and limitations, which he asked the Court to read into the clause. After the *Yates* decision, for example, the Solicitor General proposed to construe the membership clause as applying only to "active" membership.[40] The rationale of this proposal is obscure, as the

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[39] *Supra*, p. 25, note 30.

[40] Supplemental Memorandum for the United States on reargument in *Scales* v. *United States* and *Lightfoot* v. *United States*, Nos. 3 and 4, October Term, 1957, at p. 3. Therein the Solicitor General first suggested that "activity" should be determined not by the jury but by the trial judge, in the manner of "clear and present danger". Perhaps sensing the fragility of this theory, the Solicitor General (Supplemental Memorandum, pp. 5-7) fell back to the position that "activity" be made an element to be found by the jury, and proposed the instruction that should be given. As described below (*infra*, pp. 41-43), at Scales' trial the prosecution followed this second course of action.

*Yates* case itself holds that "activity" is not the test of criminality under the Smith Act. The five defendants whose acquittal was there ordered (354 U. S. at 330) had been exceedingly "active" in the Communist Party. But they were not shown to have ever engaged in other than "wholly lawful activities", and in terms of the First Amendment some kinds of activity may be significant and others completely irrelevant. To read the word "active" into the membership clause, therefore, adds nothing of significance for purposes of the First Amendment, and merely renders the clause vague, and correspondingly vulnerable under the Fifth Amendment.

And so, after grafting intent and "activity" onto the membership clause, the Government sought to make it encompass the characteristics of conspiracy as well, arguing[41] that it applies to "high-level" membership, to "tightly disciplined, quasi-military, deeply conspiratorial activities", and to "the concert-of-action, combination, and acting-together which characterize conspiracy". But this reduces the Government's case to absurdity, for the language of the clause is thus used as a mere pedestal on which to erect an elaborate structure of descriptive limitation which finds no support in the wording or purpose of the clause and like the lower court's spurious equation of membership with conspiracy, renders the clause merely duplicative of the Smith Act's other provisions.

Such strained contentions make a mockery of all principles of legislative construction. That the Government resorts to them reflects the hopeless nature of its dilemma. The membership clause is unconstitutional as written, and efforts to save it by judicial amendment must fail either for inadequacy or as rendering the clause meaningless and redundant surplusage in the Smith Act.

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[41]Brief for the United States in *Scales* v. *United States*, No. 29, October Term, 1956, at p. 45.

This Court has held that past membership in the Communist Party is no basis for refusing admission to the bar, and does not support an inference of bad character. *Schware v. Board of Bar Examiners*, 353 U. S. 232; *Konigsberg v. State Bar*, 353 U. S. 252. If Party membership is a sign of "wooly mind or naive notions regarding the problems of society" (353 U. S. at 250-51), still that is hardly a sufficient basis for conviction of felony under the laws of the United States, and a sentence of six years' imprisonment.

## II. AS APPLIED IN THIS CASE, THE MEMBERSHIP CLAUSE OF THE SMITH ACT IS UNCONSTITUTIONAL UNDER THE FIRST, FIFTH AND SIXTH AMENDMENTS.

If the membership clause be assumed constitutional on its face, the question follows whether it is constitutional as applied in this case. In the *Dennis* case, the Court explicitly recognized (341 U. S. at 514-16) that the Smith Act may be constitutionally fair in one application but foul in another.

### A. Unconstitutionality Under the First and Fifth Amendments

The facts which the prosecution sought to establish by the evidence it offered on the second trial of this case were avowedly (R. A10-A13) selected with an eye to the standards of proof laid down by this Court in the *Yates* case. Under those standards, advocacy of forcible overthrow is punishable under the Smith Act only (354 U. S. at 312, 320) if the advocacy is of such a nature as to "incite" persons to take "concrete action for the forcible overthrow of government."

At the trial, however, the prosecution and the court put an erroneous construction on this requirement. The prosecution saw only the words "concrete action," and ignored or overlooked the qualifying phrase "for the forci-

ble overthrow of government." As a result, the prosecution took the position that proof of Communist Party incitement to action of *any kind* would be relevant to the case and sufficient to meet the standard of proof prescribed in the *Yates* case.

The prosecution's theory was first articulated when it offered in evidence a copy of the publication *Textile Workers' Voice*, together with testimony that if was a Communist Party organ and had been given by the defendant to the witness then on the stand (R. A7-A9 and 310-11; Tr. 1132-35). The witness then read to the jury (R. A8-A9) a long extract from the April, 1949 issue attacking the Atlantic Pact and the Truman Administration, and urging readers to write to Senators Hoey and Graham and ask them to vote against "this war pact." In reply to a defense motion to strike, the prosecuting attorney stated (R. A-9): ". . . it is directly linked with the defendant and it carries with it what we call his language which incites to action. It is urging action either now or in the future. 'Write to your Senators.' It expresses the desire of the Communist Party, and we think the language itself is inciting to action."

At the time of offer, the trial Judge reserved ruling on the admissibility of this and half a dozen similar documents (R. A13-A14; Tr. 1676 and 1705). In the course of argument, prosecution counsel repeated their contention that publications urging readers to write to Congressmen embodied "language that tends to incite and urges action likewise" (R. A11 and A13), and argued generally that Communist "propaganda" in opposition to United States policy in Korea "was one of the action campaigns of the Party" (R. A13; Tr. 1830). The defense replied that the action "incited" by these articles was patently irrelevant to the issue of forcible overthrow, was therefore not the sort of "action-inciting" advocacy referred to in the *Yates*

case, and that public criticism of foreign policy and writing letters to Congressmen are rights protected by the First Amendment (R. A11-A12; Tr. 1926).

The trial Judge ultimately excluded four and admitted three of the contested documents.[42] The prosecuting attorney then read to the jury long extracts (R. A18-A22; Tr. 1807-27) from the three admitted documents (G. Exs. 64, 65 and 66). All three were violent attacks on United States actions and policies in Korea. None of them contains any reference whatever to force and violence as a means of effecting political change or bringing about a Communist regime in the United States; all were totally irrelevant to the issue before the jury. One of the extracts (G. Ex. 66, R. A20-22) is so blood-curdling and calculated to inflame an American jury with passion and hatred against its authors, or anyone distributing it, that the defense promptly but unsuccessfully moved for a mistrial (R. A23; *infra* pp. 65-66). The prosecuting attorney singled out these documents for special attention by the jury (R. A22 and A24), and in his summation urged the jury to look at the most inflammatory document (G. Ex. 66) "and see whether there is language in that exhibit that would incite you to action" (R. A24).

The prosecution offered other evidence of "action" which was similarly irrelevant and objectionable. For example, the Government attorneys laid stress (R. A10; Tr. 1139) on Mrs. Hartle's testimony about the Communist Party's public opposition to American participation in the Korean War.

The defense requested the trial Judge to charge the jury (R. A33-A34) that (a) the "action for the forcible overthrow of the government" referred to in the *Yates* case does not include constitutionally protected activities such as

[42] R. A18. The judge did not state the grounds of his decision, or his reasons for distinguishing among the documents.

speaking, publishing, or writing letters to public officials, unless those means of public persuasion are used to advocate forcible overthrow of the government, and (b) the defendant could not be found guilty "if the activities incited by the Communist Party include only such means of public persuasion as are used to voice opinions on public issues of foreign and domestic policy, no matter how unpopular or odious to the majority of American citizens those opinions may be." The prosecution objected, and the court refused to give the instruction (Tr. 1926 and 1937).

Thus the constitutional issue is sharply posed. Can the Smith Act be constitutionally applied to punish advocacy of violent overthrow of government (whether through membership in an organization, as here, or by conspiratorial or individual participation), on the basis of evidence of advocacy that incites people to action by way of speech, press, petition, or assembly, which is vehemently critical of governmental policy and actions, but which does not advocate or incite action directed to forcible overthrow of the government?

To answer this question in the affirmative, the Government must take the position that, if violent overthrow is part of the "abstract theory" or "doctrinal" paraphernalia of the Communist Party (354 U. S. at 312-21), then any kind of action which the Party incites—even if wholly lawful and specifically protected by the First Amendment—is action-inciting advocacy within the meaning of the *Yates* case. But in fact the *Yates* case explicitly holds the reverse of this proposition. It holds that the action incited must be (354 U. S. at 320) "for the forcible overthrow of the Government."

The Government might reply (R. 1142) that any action incited by the Communist Party will be intended, at least in the long run, to achieve the Party's objective of violent overthrow. But the application of this theory would render

meaningless the standard as applied in the *Yates* case. The five defendants acquitted in the *Yates* case had incited a great deal of action, through speeches soliciting votes for Communist-supported candidates, lectures urging listeners to read Communist literature, and articles and periodicals promoting action in support of or against a wide variety of persons and policies. Nevertheless, their acquittal was ordered by this Court because (354 U. S. at 330-31) the action incited was unrelated to forcible overthrow of the Government, and otherwise "wholly lawful."

If there ever might have been any basis for the Government's theory, it was removed years before the *Yates* case by *De Jonge* v. *Oregon*, 299 U. S. 353 (1937). In that case a Communist Party member was prosecuted under the state statute against criminal syndicalism, for participating in a public meeting called by the Communist Party to protest against police activities during a longshoremen's strike. On appeal to this Court, it was not disputed that the Communist Party did in fact advocate criminal syndicalism—a doctrine defined to include advocacy of force and violence as a means of political change (299 U. S. at 357 and 360). It was likewise agreed that criminal syndicalism was not advocated at the public meeting; the state court had sustained the conviction on the basis that the auspices of the meeting—i.e., a group that advocated criminal syndicalism—rendered participation in the meeting criminal even though the advocacy there engaged in was entirely lawful.

It is plain that the prosecution's theory in the *De Jonge* case was the same as that of the prosecution in the present case: the use of speech, press and assembly to oppose American involvement in Korea is lawful *per se*, but becomes unlawful if the auspices are those of the Communist Party. This theory was, however, unanimously rejected in the *De Jonge* case and the conviction was set aside. In his opinion, Chief Justice Huges pointed out (299 U. S. at

365) that the auspices under which the meeting was held could not constitutionally govern the outcome of the case. For notwithstanding the violent objectives of the Communist Party as found by the Supreme Court of Oregon (299 U. S. at 365-366):

> "... the defendant still enjoyed his personal right of free speech and to take part in a peaceable assembly having a lawful purpose, although called by that Party. The defendant was none the less entitled to discuss the public issues of the day and thus in a lawful manner, without incitement to violence or crime, to seek redress of alleged grievances. That was of the essence of his guaranteed personal liberty."

This conclusion was specifically reaffirmed by this Court in *Herndon* v. *Lowry*, 301 U. S. 242, 258. See also *Beauharnais* v. *Illinois*, 343 U. S. 250 at 270: "It is when speech becomes an incitement to crime that the right freely to exhort may be abridged." Of course, the action incited need not be violent or criminal standing alone. But it must be in furtherance of crime—in the present case, in furtherance of the forcible overthrow of the Government.

The court below sustained the admissibility of this evidence (R. 480-81) on the ground that it was "clearly intended to blacken the United States and stir up animosity against it and thus weaken its ability to defend itself should a revolution be attempted." But this conclusion is quite untenable under the principle of the *De Jonge* case, *supra*.

Furthermore, the grave dangers of such a view are easily perceptible. It would render all contentious literature on national issues potential proof of seditious advocacy. There are several issues dividing our country today, involving arguments and accusations that may well "blacken" and "stir up animosity against" the government. If the projection of such arguments in published form may now be taken as evidence of incitement to action for overthrowing

the government by violence, there is little substance left in the First Amendment.

But even if the lower court's view be accepted, the petitioner was gravely prejudiced by the trial judge's refusal to instruct the jury that they could not find the defendant guilty on the basis of such evidence *alone* (R. A33-A34; Tr. 1926 and 1937). This error was emphatically urged below, but is not touched on in the lower court's opinion. By refusing so to charge, the trial judge left the jury free to find unlawful, action-inciting advocacy on the basis of this evidence alone, irrelevant and inflammatory as it was.

The mere exercise of the constitutionally protected rights of speech, press and assembly to criticize the conduct of national affairs is not "an incitement to crime." It cannot constitutionally be made the basis of a finding of guilt under the Smith Act. In receiving and permitting the jury to consider such evidence sufficient as proof of unlawful *advocacy*, the court below applied the Smith Act in violation of the First Amendment.

During the trial the prosecution offered, and the court admitted over objection, an enormous amount of other incompetent, irrelevant and prejudicial evidence. Five prosecution witnesses, none of whom had any knowledge of the appellant or of any Communist Party activities with which he was connected, filled hundreds of pages of the record with their testimony. The prosecution's proof ranged over an exceedingly broad area, including matters of personal morals, race relations, religion, and other matters possibly pertinent to a doctoral dissertation on the Communist Party, but quite irrelevant to the question of forcible overthrow.

Below (*infra*, pp. 64-71) we discuss these matters as they relate to the fairness of the trial. We there point out that the admission of extensive testimony, concerning statements and activities unknown to and remote in

time and place from the appellant, was both erroneous and highly prejudicial. But these matters also bear directly on the constitutionality of the membership clause as applied in this case.

By the blanket admission of third party declarations through the testimony of witnesses who have been members of the Communist Party, the judgment below has created especially grave perils to free speech. The apparently limitless scope of "evidence" for which the appellant was held answerable has created an extraordinary and dangerous situation. Congress has expressly declared, in accordance with the Constitution, that it is not a crime—indeed it is protected by the Constitutional rights of speech, press, and assembly—to be a member of the Communist Party and participate in its activities. But under evidentiary rulings such as were made below, these rights are exercised only subject to serious and undefined hazards. One may be convicted of violating the Smith Act through the declarations of strangers, living and dead, solely because of their membership and activity in the Communist Party.

The metes and bounds of the Smith Act, in terms of guilt or innocence, are thus rendered so vague and far-reaching as plainly to trespass not only on the First Amendment, but on the due process clause of the Fifth Amendment as well. *Winters* v. *New York*, 333 U. S. 507. The essential elements of the offense punished by the membership clause—"membership" and "advocacy"—are rendered both infinite and amorphous by releasing such a Niagara of evidence to inundate the jury.

Thus the appellant was deprived of any real opportunity to defend himself against the charge of sedition. Other and equally vicious consequences followed as a matter of course, as the range of "admissible evidence" was allowed to stretch ever farther into the past and ever more remote from the accused. The result is that by these evidentiary

rulings, the court below applied the Smith Act in violation of the First and Fifth Amendments.

**B. Unconstitutionality Under the Fifth and Sixth Amendments**

Under the Sixth Amendment, the accused must be "informed of the nature and cause of the accusation." Under the Fifth Amendment, the vehicle for imparting this information is the indictment. To satisfy these requirements, the indictment must be sufficiently specific to inform the defendant of the nature of the charge, protect him against double jeopardy, and enable the court to determine whether or not the facts stated therein, if proved, would support a conviction. *United States* v. *Cruickshank*, 92 U. S. 557; *Rosen* v. *United States*, 161 U. S. 29.

In the course of the three and a half years since the indictment in the present case issued, it has become clear, and is conceded by the Government, that the facts stated therein do *not* support a conviction. The Government itself requested the trial judge to charge the jury that a criminal offense would not be made out unless it were proved that the defendant was an "active" member of the Communist Party, although the indictment says nothing about this matter, which has now been treated as an essential element of the offense. Appellant questions the correctness of this ruling but, correct or not, there has certainly been an amendment of the indictment by judicial action,[48] forbidden by the rule long since laid down in *Ex parte Bain*, 121 U. S. 1.

[48]The proceedings under this indictment have rendered it defective in another respect, for the lower court was unable to sustain the membership clause except as a statute punishing conspiracy (R. 459). For the reasons heretofore given (*supra*, pp. 31-32), we question the validity of this construction of the clause. But if it were to be adopted, the inevitable consequence would be that the petitioner has been convicted of a crime for which he was not indicted.

Either "activity" is an essential element of the offe under the membership clause, or it is not.[44] If not, government must support its constitutionality without s limitation. If so, then the indictment omits to charge essential element, and is defective under Rule 7(c) of Federal Rules of Criminal Procedure, which requires t indictments contain "the essential facts constituting the fense charged." Before trial the defense unsuccessfu moved to dimiss the indictment on this very ground (amo others) that it did not embrace the elements of the offe as defined by the Solicitor General. Under numerous de sions of this Court and the lower federal courts it is cl that, if "activity" is an element of this offense, the con tion must be reversed and the indictment dismissed. *Uni States* v. *Carll*, 105 U. S. 611; *Morisette* v. *United Sta* 342 U. S. 246; *United States* v. *Lamont*, 18 F. R. D. (S. D. N. Y.), aff'd 236 F. 2d 312 (C. A. 2); *Uni States* v. *Schneiderman*, 102 F. Supp. 87 (S. D. Cal.).

Likewise, if "activity" is read into the clause in acco ance with the Government's theory and the trial cou charge, the clause is rendered so vague as to be insuffici as a standard of guilt under the due process clause of Fifth Amendment. *United States* v. *Cohen Grocery C* 255 U. S. 81; *Musser* v. *Utah*, 333 U. S. 95. How m "activity" over how long a period of time makes one "active" member of an organization? The painful ina quacy of the standard is reflected in the trial judge's cha

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[44]The Government has sought to have it both ways. The instr tion on "activity" (R. A41) was given at the prosecution's requ even though the trial judge thought it unnecessary (Tr. 1934). defendant took exception (R. A47-A48). But in the Court of Appe in order to meet the argument that the indictment lacked the elem thus treated as essential in the charge, the Government argued (G Br. p. 34) that the instruction was "unnecessary".

(R. A41) that the defendant "must have devoted all, or a substantial part, of his time and effort to the Party."[45]

The court below brushed aside (R. 462) these arguments on the ground that "the defendant was not prejudiced by the instruction that in order to convict, the jury must find that he was not only a member but an active member of the Party." But this misses the point.[46] If activity is an element of the offense, the petitioner was prejudiced[47] not by the instruction to that effect but by the indictment's failure to specify this element, and by the statute's resultant vagueness.

If unlawful "activity" or conspiratorial incitement to violence is the burden of the Government's accusation against Scales, let him be indicted on that basis. Let the persons with whom he concerted and combined be named, the acts be specified, and the combination and joint action be proved under an indictment which embodies these charges. But under the present indictment, such a theory of the case necessarily involves an application of the mem-

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[45]*Cf. Noto* v. *United States*, decided December 31, 1958 (C. A. 2), pending here on petition for certiorari (No. 564 Misc.), in which the court reads the membership clause as applicable to "high level, active membership unremittingly devoted and pledged to the accomplishment of" violent overthrow.

[46]The defense objected to the instruction as prejudicial (R. A47-48, and *infra*, p. 56, note 71), and the Court of Appeals' own opinion is ample evidence of the confusion to which the instruction may give rise (R. 402): "This instruction [i.e. on "active" membership] was completely in harmony with the view expressed by the Supreme Court that the Smith Act contemplates not merely the advocacy of a theory of government but the advocacy of concrete action of an unlawful character". Of course, the *Yates* case expressly holds (354 U. S. at 330-31) by its acquittal of the five defendants who were very active functionaries, that Party activity is not evidence of action-inciting advocacy.

[47]Although a defective indictment which is not challenged prior to trial will be upheld unless the defendant is prejudiced, this is not true where (as here) the indictment is challenged as insufficient prior to trial. *Cf. Hagner* v. *U. S.*, 285 U. S. 427.

bership clause which is unconstitutional under the Fifth and Sixth Amendments.

## III. THE INDICTMENT FAILS TO STATE AN OFFENSE UNDER THE LAWS OF THE UNITED STATES.

In any prosecution of a Communist Party member under the membership clause, the question of the effect of Section 4(f) of the Internal Security Act of 1950 is posed *in limine*. For if Section 4(f) is given the effect that logical analysis requires and the legislative history supports, it is a bar to such prosecutions.[48] Accordingly, the indictments in this and similar cases fail to state an offense under the laws of the United States.

Section 4(f) provides that neither Communist membership nor office-holding "shall constitute *per se* a violation of subsection (a) or subsection (c) of this section or of any other criminal statute". The court below, relying on the phrase "*per se*", held (R. 461) that Section 4(f) does not apply to Communists "who hold membership in the organization with guilty knowledge of its criminal purpose to bring about the violent overthrow of the government". Such membership is not "mere" (i. e. "*per se*") but "with knowledge", and this added element removes it from the scope of Section 4(f).[49]

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[48]Since Section 4(f) applies only to prosecutions of members and officers of "any Communist organization", it does not repeal the membership clause of the Smith Act, which applies to membership in any organization of persons who advocate violent overthrow of the government. Rather, Section 4(f) limits the scope of the clause by excluding the category of persons specified in Section 4(f).

[49]The Court of Appeals has also relied (227 F. 2d at 589) on Section 17 of the Internal Security Act (50 U. S. C. 796), which provides that: "The foregoing provisions of this subchapter shall be construed as being in addition to and not in modification of existing criminal statutes". On familiar principles of construction, however, this general provision does not override the specific reference in Section 4(f) to "any other criminal statute". *Ginsberg & Sons v. Popkin*, 285 U. S. 204.

The effect of this construction, obviously, is to limit Section 4(f) to Communists who do *not* have the stipulated knowledge. But this is wholly incompatible with the structure and purpose of the Internal Security Act in general and Section 4(f) in particular.

### A. Legislative History of Section 4(f) of the Internal Security Act of 1950

Section 2 of the Internal Security Act (50 U. S. C. 781) embodies a "congressional finding of necessity" in which "Congress finds" that (paragraphs 6 and 15) the Communist movement in the United States, including Communist organizations that "designate themselves as political parties", is "an organization . . . rigidly and ruthlessly disciplined . . . seeking to advance a moment when . . . overthrow of the Government of the United States by force and violence may seem possible of achievement . . ." in order to set up a "Communist totalitarian dictatorship" which will be "subservient" to other such dictatorships. There is no doubt, in the light of this finding, that Congress in enacting the Internal Security Act regarded the Communist Party as a group of persons who advocate and encourage the violent overthrow of our Government, such as is described in the Smith Act.

Section 4(a) of the Internal Security Act makes it a crime "knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship . . . under the domination or control of any foreign government . . . organization . . . or . . . individual". Sections 7 and 8 of the Act (50 U. S. C. 786-87) provide for compulsory registration, under severe criminal penalties for failure, of Communist organizations and members. Especially in view of the "Congressional

finding" in Section 2, it is obvious that the registration provisions raise serious questions of self-incrimination for Communist members under Section 4(a). It was in order to deal with this problem that subsection (f) was originally added to Section 4, as the legislative history indisputably shows.

In the Eightieth Congress, the precursor bill, known as the Mundt-Nixon bill,[50] contained no immunity provision of any kind. In the next Congress, and while a successor bill[51] was under consideration in the Senate Judiciary Committee, the late John W. Davis pointed out, in a letter to the Committee, that the compulsory registration provisions might be unconstitutional as compelling self-incrimination under the section of the same bill making it a crime to conspire to establish a foreign-controlled totalitarian dictatorship in the United States.[52] This letter appears to have instigated the language thereafter inserted in both House and Senate that developed into Section 4(f) of the Act.

The House bill[53] was reported out with a provision which merely forbade the receipt in evidence of the fact of registration in prosecutions under the Internal Security Act itself. On the floor, Congressman Celler pointed out that this provision was not only deficient under the rule of *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892), but also that it furnished no protection against prosecutions under the Smith Act.[54] Shortly thereafter the manager of the bill[55] offered an amendment, adopted *viva voce*, which

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[50]H. R. 5832 (80th Cong., 2nd Sess.). This bill passed the House but died in the Senate.

[51]S. 2311 (81st Cong., 1st Sess.).

[52]S. Rep. No. 1385, 81st Cong., 2nd Sess., pp. 43-44.

[53]H. R. 9490 (81st Cong., 2nd Sess.), passed by the House on August 29, 1950.

[54]96 Cong. Rec. 13739-13740.

[55]96 Cong. Rec. 13761. The manager was Congressman Wood who was also then Chairman of the Un-American Activities Committee. His amendment, of course, accomplished nothing in terms of the *Counselman* case, *supra*.

granted the same protection against prosecutions "for any alleged violation of any other criminal statute."

The Senate bill,[56] in the meantime, was reported out with a provision that neither membership nor office-holding in any Communist organization should constitute a violation of the Internal Security Act. In a minority report,[57] Senator Kilgore pointed out this provision "does not even purport to avoid self-incrimination in relation to the membership clause of the Smith Act." The same criticism was made on the Senate floor by Senators Humphrey, Lehman, and Kefauver,[58] but it was not amended in the respect prior to its passage by the Senate. In conference, however, Section 4(f) assumed the form in which it was enacted into law, and it was there that the words "per se" and "or of any other criminal statute" were added to the first sentence,[59] with which we are presently concerned.

**B. Section 4(f) is a Bar to the Prosecution of Communist Party Members and Officers under the Membership Clause**

This conclusion follows inevitably from the logic and legislative history of Section 4(f). Plainly, Congress added the words "or of any other criminal statute" with the membership clause specifically in mind. And the Government (as well as the court below) misses the essential point when it argues, as it did when the case was last here (Brief for the United States on petition for certiorari, pp. 13-14), that Section 4(f) was not intended to modify any other statute but only "to insure the enforceability of the registration provisions of the . . . Internal Security Act. . . . by making the privilege against self-incrimination unavail-

[56] S. 4037 (81st Cong., 2nd Sess.).
[57] S. Rep. 2369, Part 2 (81st Cong., 2nd Sess.).
[58] 96 Cong. Rec. 14190, 14479, 15198-99.
[59] H. Rep. No. 3112 (81st Cong., 2nd Sess.); 96 Cong. Rec. 15280.

able as a defense to failure to register." For that could be accomplished by giving Communist registrants imm from prosecution on the basis of membership.[60] I words "or of any other criminal statute" do not app the Smith Act, they are meaningless surplusage, for is nothing else for them to accomplish.

The distinction drawn below between "mere mer ship" and "membership with knowledge" is unter Whatever may be held to be the legal effect of Se 4(f), its purpose would be entirely frustrated by co ing its scope in accordance with the decision below in case. For the lower court's construction would ex from its coverage all Communists who know the objec of the Communist organization to which they belon found by Congress in Section 2 of the Act. It would be an inevitable consequence of the decision below Communists who know the Congressionally-found pur of their organization are given no immunity under tion 4(f) and could plead the privilege against sel crimination to avoid compliance with the registr provisions, which thus would be binding only on munists who do *not* know their organization's purp

In short, the construction adopted below turns entire statute into an absurdity. Plainly, membership se" means membership without other criminally signi acts or declarations, not membership without know of the purposes of the group. No other interpret accords with common sense and the plain purpose provision.[61]

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[60]Whether or not Section 4(f) successfully accomplishes tended purpose is another question, not here at issue. *Cf. Com Party* v. *Subversive Activities Control Board*, 351 U. S. 115.

[61]*Cf. United States* v. *Ginn*, 222 F. 2d 289, at 290-91. It also be noted that both Sections 4(a) and 4(c) make kno an element of the crimes they proscribe, so that if Section 4(f construed to cover only membership without knowledge, it

It may be added that in 1954 Congress, during the debates on the bill that became the Communist Control Act of 1954 (50 U. S. C. 841-844), again manifested its understanding that Section 4(f) of the Internal Security Act bars the prosecution of Communists for membership with knowledge.[62] To the original bill (S. 3706, 83rd Cong. 2nd Sess.), Senator Humphrey offered an amendment containing a Congressional finding (parallel to that in Section 2 of the Internal Security Act) that the Communist Party aims to overthrow the Government by force and violence, and a criminal proscription of membership in the Communist Party with knowledge of its purposes. 100 Cong. Rec. 14208. This, of course, was substantially the same as the "membership clause" of the Smith Act.[63]

Had the penal provisions of the Humphrey amendment been enacted, they might have operated as a *pro tanto* repeal or modification of Section 4(f) of the Internal Security Act—i.e., they might have reinstated the liability of Communists to prosecution for membership with knowledge under the new legislation *or* under the membership clause of the Smith Act. This, in turn, would have greatly fortified the plea of self-incrimination by Communist Party

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be operative only with respect to persons who would not in any event be liable under Sections 4(a) and 4(c). This applies equally to the membership clause of the Smith Act which punishes membership only if accompanied by knowledge, so that the phrase "of any other criminal statute" would likewise be robbed of all operative effect.

[62]Of course, there is no suggestion here that the Communist Control Act of 1954 amended or repealed the membership clause. The argument is simply that the legislative history of the Communist Control Act reinforces the conclusion that Section 4(f) of the Internal Security Act limited the application of the membership clause by excluding Communist organizations from its coverage.

[63]The principal difference, irrelevant here, was that, since the Communist Party was specifically named in the Humphrey Amendment, presumably no proof of its violent purposes would have been required.

members under the registration provisions of the Internal Security Act—the very eventuality which it was the purpose of Section 4(f) to avoid. In short, Congress confronted in 1954 the identical problem it had confronted in 1950.

And so, as a result of representations from the Attorney-General and objections from many Senators and Representatives (*e.g.* 100 Cong. Rec. 14611, 14640, 14711, 14713, 14719) the criminal sanctions for membership were stricken from the Humphrey Amendment, and thus Section 4(f) of the Internal Security Act was left intact and operative to bar the prosecution of Communists for membership with knowledge, whether under that Act, the membership clause of the Smith Act, or "any other criminal statute".

Accordingly, the indictment does not charge the petitioner with any offense under the laws of the United States and the judgment below must be reversed.

## IV. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE PETITIONER'S CONVICTION UNDER THE SMITH ACT.

In the *Dennis* case, *supra*, this Court referred (341 U. S. at 516) to its own duty to review convictions under the Smith Act "with the scrupulous care demanded by our Constitution." In the *Yates* case, *supra*, the Court performed that duty by reviewing the evidence against each of the fourteen defendants, in order to determine whether acquittals should be directed, or the avenue to a second trial left open. In respect of five defendants, the evidence was found (354 U. S. at 331) "entirely too meager to justify putting them to a new trial" and their acquittal was ordered.

Nor did the Court find the evidence sufficient to sustain the other nine convictions. It merely found (354 U. S. at 332) that the evidence was not "so tenuous as not to justify their retrial under proper legal standards." Accordingly, while these convictions were reversed on the other

grounds settled in the *Yates* case, the nine defendants were not acquitted, and the Government was left free to bring them to trial again. However, the Government has not done so.[64]

The evidence against the petitioner must be scrutinized here in the light of the significant differences between the membership clause and the other provisions of the Smith Act. A member of the Communist Party who is indicted for conspiracy to violate the advocacy and organizing provisions of the Smith Act is charged with individual activity in combination with the other conspirators. Therefore, even if the prosecution fails—as this Court in the *Yates* case held that it had failed—to establish that the Communist Party as an organization advocates forcible overthrow in an action-inciting way, a defendant in a conspiracy case can be found guilty if it be proved that he and others conspired to advocate or organize in violation of the Smith Act.

But a defendant under a membership clause indictment, such as the petitioner, is not charged with violating or conspiracy to violate the advocacy and organizing provisions. He is charged only with membership in a group whereof the purposes are to advocate forcible overthrow. Therefore, unless it be proved that the Communist Party is such a group, the appellant's conviction cannot be sustained. In other words, in a membership clause case, the prosecution must establish what, as this Court determined, it failed to establish in the *Yates* case.

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[64]Nor has the Government retried the defendants in the Pittsburgh Smith Act case, *United States* v. *Mesarosh*, 352 U. S. 1, wherein this Court reversed the convictions because of the "tainted testimony" of a prosecution witness. The result is that leading national officials of the Communist Party such as William Schneiderman (a *Yates* case defendant and for a long time leader of the Communist Party on the West Coast) and Steve Nelson (Mesarosh) have gone free from further prosecution under the Smith Act, while the appellant Scales has been tried again and given a heavier sentence than any other Smith Act defendant has ever received.

**A. The Evidence With Respect to the Communist Party**

In the *Yates* case, this Court found (354 U. S. at 329) the evidence insufficient to establish that the Communist Party advocates forcible overthrow of the Government "in the sense of a call to action at some future time." To be sure, the evidence was sufficient to show that the "abstract doctrine of forcible overthrow" was "one of the tenets of the Communist Party." But given the requirement of action-inciting advocacy, the Court found the record "strikingly deficient" (354 U. S. at 329-30):

> At best this voluminous record shows but a half dozen or so scattered incidents which, even under the loosest standards, could be deemed to show such advocacy. Most of these were not connected with any of the petitioners, or occurred many years before the period covered by the indictment. We are unable to regard this sporadic showing as sufficient to justify viewing the Communist Party as the nexus between these petitioners and the conspiracy charged.

At the close of the prosecution's case, the petitioner moved (R. A18) for a judgment of acquittal, and in support thereof filed a memorandum (R. A25-A32) embodying an item-by-item comparison of the prosecution's evidence with the evidence in the *Yates* case found insufficient by this Court. As the memorandum shows, the evidence in the two cases is substantially identical. Every important strand of proof about the Communist Party that was presented at this trial had also been presented in the *Yates* trial.

This similarity is hardly surprising, for both the documents and the witnesses, of which the record in this case is the product, are veterans of numerous prior Smith Act trials. The basic Communist "classical" writings by Marx, Lenin, Stalin, and others, after all, could hardly be improved on by the Government's later efforts, however

zealous.[65] Of the prosecution's principal witnesses on the aims of the Party, Lautner had testified in seventeen Smith Act trials including the *Yates* trial (Tr. 450-51), and Mrs. Hartle had testified on the subject of Communism in nine prior trials (Tr. 893) and Cummings in six (Tr. 947-48). Without a remarkable and therefore suspicious refreshment of recollection, the prosecution witnesses' testimony about the Communist Party was bound to parallel, as it did, the earlier testimony on that subject in the *Yates* case.[66]

The prosecution sought to escape this dilemma and give the record some new color in two ways. The first was to call a greater number of witnesses then was called in the first trial,[67] in order to show a uniform pattern of instruction and indoctrination at the several and widely-scattered Party schools attended by the witnesses. However, the practical effect of this extensive testimony was merely cumulative. It added nothing beyond what was before this Court in the *Yates* case, in which there was abundant testimony that the Communist Party schools, as part of a nation-wide campaign for re-education of Party members after 1945, and in order to stamp out Earl Browder's "revisionism," taught the inevitability of force and violence in the achievement of Socialism, the dictatorship of the proletariat, the class struggle, and other such elements of "Marxist-Leninist doctrine" (R. A26-A30).

To meet the *Yates* case requirement of action-inciting advocacy, the prosecution relied chiefly on the three documents discussed heretofore (G. Exs. 64; 65, and 66, *supra*, pp. 34-39), and on testimony describing the various

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[65]The prosecution's basic documentary proof about the purposes of the Communist Party was in fact substantially the same in both the *Yates* case and the present case (R. A31).

[66]The duplicating items and strands of proof are listed in the memorandum in support of the motion for acquittal (R. A26-A-30).

[67]Lautner, Clontz, and Childs were the only prosecution witnesses at the first trial.

kinds of action that the prosecution witnesses took or were urged to take while in the Communist Party. For the reasons already given (*supra*, pp. 34-41), the admission of these documents and similar evidence has raised insuperable constitutional obstacles to the application of the Smith Act in this case. But apart from these constitutional problems, the prosecution's evidence completely failed to meet the standards required by the *Yates* case.

The general nature of the prosecution's proof is reflected in the extracts in the printed portions of the record. Lautner's testimony on Party action was redundant and general (R. A3, 105-08). Mrs. Hartle discussed (R. A3-A4) Communist Party propaganda about the Korean War, basically similar to the three documents by which the prosecution set such store. On cross-examination she was asked to describe her Party activities in detail; her testimony in response (R. A5-A6) is utterly devoid of anything resembling a "call to forcible action."

Both Lautner and Mrs. Hartle testified at considerable length concerning the Communist "underground." Although the prosecution strove manfully to give this the sinister aspect of a Party organization for secret revoluntionary work, it emerged clearly enough (R. A6-A7; Tr. 514-18 and 860-67) that the "underground" was caused by the Smith Act prosecutions of Communist leaders that began in 1948, and was simply a matter of going into hiding to avoid arrest under that Act and preserve the rudiments of Party organization.[60] At all events no evidence of underground activity of an unlawful nature is to be found in the record.

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[60] J. Edgar Hoover, Director of the Federal Bureau of Investigation, recently described the Communist "underground" in much the same way. Hoover, *Masters of Deceit* (1958), pp. 75-76:

> "In 1948, for the first time since the 1920's the Party found itself on the defensive when the Department of Justice initiated prosecution against its leaders. The twelve members of the Party's National Board were indicted under the Smith Act

The Court of Appeals wholly failed to deal with this problem;[69] there is not a word in its opinion about the evidence reviewed in the *Yates* case. There is no specification of evidence about the Communist Party, given at petitioner's second trial, which might be deemed to meet the crucial deficiencies noted by this Court in the *Yates* case. The opinion below recites the evidence at length (R. 463-71), but the conclusory summation (R. 477-79) contains absolutely nothing that was not equally present and relied upon by the prosecution in the *Yates* case. And so the strange outcome

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(enacted in 1940), which prohibits any conspiracy that advocates the overthrow of the United States government by force and violence. . . .

"In a long trial, running through most of 1949, eleven members were convicted, the twelfth, William Z. Foster, having been severed from the trial because of illness. In June, 1951, the Supreme Court upheld these convictions, and the government subsequently took prosecutive action against additional Party leaders.

"This government prosecution was a strong disabling blow against the Party. Many of its top leaders were arrested and convicted. Others lived in fear of arrest. As a result the Party to a large extent went underground in the first large-scale underground operation since the early 1920's. Party offices were closed, top Party leaders went into hiding, records were destroyed. Courier systems were instituted and clubs broken up into small units, if not completely disbanded. For about four years, from mid-1951 to mid-1955, the Party in protecting itself spent energy, time and money that otherwise would have gone into agitation and propaganda."

[69]This failure is the more remarkable in that, although the Government tried to contend (Govt. Br. pp. 36-40) that the evidence against the Communist Party at Scales' second trial was stronger than in the *Yates* case, it also declared (*Id.* pp. 31-32) that the evidence at Scales' second trial was not "qualitatively different from that adduced at his first trial." When the *Scales* case was last before this Court, the Solicitor General (Brief for the United States No. 29, October Term, 1956) described the evidence about the Communist Party as (p. 7) "very similar and in some respects identical" and (p. 57) "substantially similar" to that in 17 other Smith Act cases, including the *Yates* case. Under these circumstances, the court below might well have inferred that the government's evidence about the Communist Party, after some 20 trials, is not easily altered, and that this Court's analysis of that evidence might be pertinent here.

is that the Communist Party has been found to be an action-inciting organization in Greensboro, on the basis of evidence substantially similar to that which this Court held insufficient in Los Angeles.

**B. The Evidence With Respect to the Petitioner**

The prosecution's case in support of the charges that Scales knew the Communist Party as an organization that advocates forcible overthrow of the Government, and that he personally intended to bring about such overthrow, rests entirely on the testimony of the witnesses Clontz, Childs and Reavis. Through them, the prosecution offered considerable vidence of Scales' activities as a Party member and local official, upon which it heavily relies to establish Scales' knowledge of the Party's unlawful aims. But of course Party activities, extensive though they may be, do not constitute sufficient evidence of personal knowledge or intent. As Judge Dimock observed during a Smith Act conspiracy trial:[70] "I think there must be some showing that the activities were such as to bring them (the defendants) in contact with the particular tenets of the Party that are treated as illegal . . ." Mere attendance at Party meetings is poor evidence of knowledge and no evidence of personal intent to overthrow the Government as soon as possible. To support such inferences, the Party activities must somehow be "in contact with" the Party's unlawful aims.[71]

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[70] *United States* v. *Flynn*, C. 136-7 (S. D. N. Y.), aff'd 216 F. 2d 354, convictions of two defendants set aside, 130 F. Supp. 412. The quotation is from the colloquy during argument on motion for a directed verdict of acquittal (Tr. 9961 of C. 136-7).

[71] Nevertheless, as described *supra*, pp. 41-43, the trial court charged the jury, over objection, that the defendant would be criminally liable only if he was an "active" member of the Party. The defense excepted to this instruction, on the ground that it was phrased in such a manner as to suggest to the jury that guilty knowledge might be inferred from mere activity.

In fact, the evidence with respect to Scales' knowledge and intent is so stale and sparse as to be plainly insufficient for either constitutional or statutory purposes. The only testimony relating to any declaration by the appellant or in his presence, wherein overthrow of the Government by force is directly adverted to, concerns two conversations with Clontz (R. 246-47, 263-65 and 473-74) in December, 1948 and March, 1950, long before the beginning of the three-year limitations period. Assuming the truth of Clontz' testimony, [72] the petitioner's statements amounted to nothing more than abstract Communist Party doctrine, and establish neither his knowledge of any action-inciting advocacy by the Party, nor his personal intent to overthrow the Government by force.

The remarks attributed to the petitioner by Clontz refer to the supposed impossibility of achieving communism by means of education and the ballot alone, without the use of force. The opinions said to have been expressed by Scales are very similar to those attributed to the defendants in *Nowak* v. United States, 356 U. S. 660, and *Maisenberg* v. *United States*, 356 U. S., 670, 672-73. In the former, for example, Nowak was said to have stated at various Party meetings and gatherings (356 U. S. at 665-68) that the Party could not gain its ends by means of the ballot but that "it would eventually resolve to bullets", and that "the goal of all of this activity was to extend the Soviet system around the face of the earth." But this Court ruled that remarks of this type establish nothing more than "abstract predictory opinions", and fail to show "advocacy of violent action."

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[72] The earlier of these statements was said to have been made during the second meeting and first conversation about Communist Party doctrine between Scales and Clontz. It seems highly unlikely that Scales would have discussed violent overthrow with Clontz as almost a complete stranger.

The testimony of the witnesses Reavis and Childs concerned activities of and declarations by the petitioner that are highly controversial and certainly are anathema to most Americans. But their testimony contains nothing that supports Scales' conviction under the Smith Act as construed in the *Yates* case. In an effort to comply with the "action-inciting" standard of proof, Childs, prepared a list, from which he testified, of all the activities he was asked to engage in while he and the petitioner were members of the Communist Party (R. A14-A18). His testimony in this respect may be examined in vain for any indication of action directed toward the forcible overthrow of the Government, or activities that were in any way unlawful. The prosecution, by a leading question, brought out that Childs was urged to write letters seeking leniency for the Rosenbergs (R. A17-A18), but this helps the Government's case not at all and simply compounds the constitutional problems (*supra*, pp. 34-39), underlined by the trial court's refusal to give the defendant's proposed instruction No. 7 (R. A33-A34).

Childs and Reavis both testified about experiences which occurred while appellant was in the "underground," and the prosecution bore down very heavily on this matter in summation (R. A24-A25; Tr. 2103-04, 2181-83). But here, again, the Government was unable to produce a scintilla of evidence of incitement or unlawful activity on the petitioner's part. Indeed, its failure was so complete that in summing up to the jury, the prosecuting attorney was obliged to concede that (R. A24-A25): "He [Scales] was underground for three years; where he was, we don't know. What he did, we don't know. Who he contacted, how many converts he brought to communism, we don't know."

In the upshot, there was nothing to support the judgment of conviction, insofar as it is based on the petitioner's personal knowledge and intent, other than inferences that might be drawn from Scales' Party membership and offi-

holding. But these are not sufficient under the Constitution or the Smith Act as expounded in the *Dennis* and *Yates* cases. Referring to persons debarred from naturalization for advocacy of violent overthrow of the Government, Justice Reed, dissenting in *Bridges* v. *United States*, 346 U. S. 209, at 234, observed that "there is no necessary identity in law between Communist Party members and such persons." The Government must establish far more than Party membership and activity in order to prove guilty knowledge and intent.[73] But in this case the prosecution was empty-handed and Scales' conviction must be reversed.

## V. THE PETITIONER WAS DENIED A FAIR TRIAL.

The petitioner's indictment and trial were vitiated by numerous prejudicial errors, of which four are before this Court for review on certiorari.

### A. The Grand Jury Was Illegally Impanelled.

Prior to the first trial, appellant filed a motion challenging the grand jury panel which returned the indictment. The hearing showed that the method for securing names of the panel was that the clerks and jury commissioner requested various individuals, such as local sheriffs, superintendents of public schools, bank presidents, and the Chairman of the Republican and Democratic Parties in the counties in the District, to provide the names of persons who were "suitable for jury service." The only information received by

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[73] See *People* v. *Lloyd*, 304 Ill. 23, 88, 136 N. E. 505, 530 (1922), per Thompson, C. J. (under an Illinois statute comparable to the Smith Act): "Individuals ought not to be condemned for mere membership in organizations, nor should they be held to believe in, advocate, and work to accomplish every word, sentence, or plank in their party platforms . . . There must be proof of a conscious guilt by individual action before it can be said that the individual adopts and approves the language of the party platform."

the jury commission concerning these prospective jurors was their names and addresses. No questionnaires were ever sent to the members of the jury panel either prior to or after placing their names in the box, nor were the individuals who were asked to supply names for jury service ever informed of the qualifications for jurors.[74]

The federal statutory provisions (28 U. S. C. 1861 and 1864) governing the qualifications and methods of selecting grand and petit jurors are set forth in the Appendix (*infra*, pp. 6a-7a). The statute expressly provides that the names of grand and petit jurors shall be "publicly drawn from a box containing the names of not less than 300 qualified persons at the time of each drawing." This provision is mandatory and places upon the jury commission the non-delegable responsibility to see that the panel is drawn from among at least 300 persons, duly qualified in accordance with the statutory standards.

It is apparent that the method used here did not meet the statutory requirements. It was impossible for the jury commission to know whether or not the box contained the names of 300 qualified persons at the time of the drawing. All that the jury commission knew was the name of the person and his address. The commission knew nothing of the prospective juror's age, ability to read and write, mental or physical condition, character, intelligence or previous penal history. Nor were the persons who supplied the names informed of the qualifications for jurors.

The purpose of the statutory scheme for jury selection is to provide qualified jurors who are fair and impartial. A person presented before a grand jury, as well as the Government, has the right to have the prospective jurors drawn from a box containing the names of three hundred

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[74]See the transcript of Hearing on Motions, April 1, 1955, fol. 15-169.

qualified jurors. In *United States* v. *Silverman* 129 F. Supp. 496 (D. Conn. 1955), a challenge to the grand jury panel in a Smith Act case was upheld, and the indictment dismissed. The court held (at p. 511):

> "The failure by the jury commission to have determined that there were at least three hundred qualified names in the box at the time of the drawing of the grand jury . . . was a breach of the affirmative statutory duty imposed upon the commission and is fatal to the indictment . . ."

This defect in the procedure of selecting jurors, which was caused by the nonfeasance of the jury commission, invalidates the conviction even without a showing of prejudice to the defendant. For ". . . reversible error does not depend on a showing of prejudice in an individual case . . . The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts". *Ballard* v. *United States*, 329 U. S. 187, 195.

The method of selecting jurors was also an illegal delegation of the jury commission's duties. It is the duty of the clerk to select the names that go into the jury box, and that duty cannot be delegated. *Glasser* v. *United States*, 315 U. S. 60; *United States* v. *Murphy*, 224 Fed. 554. The names supplied by sheriffs, superintendents of schools, presidents of banks, and Chairmen of the Republican and Democratic Parties would be most unlikely to result in a panel consisting of a fair cross-section of the community. Under such circumstances, the jury panel is invalid. *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217. Accordingly, the judgment should be reversed with instructions to dismiss the indictment.

**B. A Fair Trial Was Precluded by the "Congressional Findings" in the Internal Security Act of 1950 and Communist Control Act of 1954**

The "Congressional findings" in the Communist Control Act of 1954 (50 U. S. C. 841) and the Internal Security Act of 1950 (50 U. S. C. 781) deprived the petitioner of the opportunity for a fair and impartial trial. The findings in the latter statute have already been described.[75] The former finds that the Communist Party "is in fact an instrumentality of a conspiracy to overthrow the government of the United States" and is dedicated "to the proposition that the present constitutional government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence."

The indictment here charges and the Government offered evidence which it claims to be proof that the Communist Party advocates the violent overthrow of the government. On this issue of fact, the defendant was entitled to a fair trial, before a jury able to reach an independent, objective and impartial verdict on the evidence. *Cf. Moore* v. *Dempsey*, 261 U. S. 86; *Frank* v. *Mangum*, 237 U. S. 309; *Manley* v. *Georgia*, 279 U. S. 1. For the jury here to find that the Communist Party does not advocate the violent overthrow of the government, it would have had to flout the Congressional finding.

In the face of this Congressional finding, it was impossible for the jury to determine the question of violent overthrow on the basis of an independent, objective and impartial viewing of the evidence. *Cf. Delaney* v. *United States*, 199 F. 2d 107. Accordingly, the judgment of conviction must be reversed.

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[75] *Supra*, pp. 45-46.

**C. Prejudicial Error was Committed by Denial of Petitioner's Request to Examine the full Texts of Written Statements Furnished to the Federal Bureau of Investigation by Prosecution Witnesses.**

The trial court denied petitioner's request to examine the full texts of statements furnished to agents of the Government by prosecution witnesses. The conviction following his first trial had been reversed by this Court on the authority of *Jencks* v. *United States*, 353 U. S. 657. But several months after the *Jencks* decision, Congress enacted Public Law 85-269, now 18 U. S. C. 3500 (Appendix *infra*, pp. 7a-9a). Under the procedure prescribed in this statute, the materiality of the reports requested by the defense, if challenged by the prosecution, is determined by the trial court *in camera*. In the present case, the prosecution did challenge the materiality of certain portions of the reports requested by the defense; such portions were then submitted to the trial judge for his review as prescribed in 18 U. S. C. 3500, and many of them were withheld from the defense.

The defendant challenged (R. 196-97) the validity of the procedures set forth in the new statute, insofar as they operated to limit his access to the full texts of these documents.[75a] This very point was passed on by this Court in the *Jencks* case (353 U. S. at 668):

> "We now hold that . . . the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less. "The practice of producing government documents to the trial judge for his determination of relevancy and materiality without hearing the accused, is disproved. Relevancy and materiality for the purposes

[75a] See 64 Harv. L. Rev. 1013 (1951).

> of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness. Only after inspection of the reports by the accused, must the trial judge determine admissibility—e.g., evidentiary questions of inconsistency, materiality and relevancy—of the contents and the method to be employed for the elimination of parts immaterial or irrelevant. See *Gordon* v. *United States*, 344 U. S. at 418."

It is clear from the foregoing passage that only a right of full access to witnesses' reports serves to protect the opportunity of the defense for full exercise of its right of cross-examination. Anything less is a denial of due process of law. "Justice requires no less." *Cf. Bowman Dairy Co.* v. *United States*, 341 U. S. 214.

Furthermore, the definition of "statement" in sub-section (e) of Section 3500 is so arbitrary, capricious and unreasonable that it violates the due process clause. Statements by prosecution witnesses may be useful for impeachment whether or not the witnesses signed or subsequently "approved" them and whether or not they are "substantially verbatim" or "recorded simultaneously." Finally, the application of Section 3500 in the present case violated the Constitutional ban (Art. I, Sec. 9) on *ex post facto* legislation, since its effect is substantially disadvantageous to the petitioner, whose alleged crime was committed before the enactment of this statute.

### D. Prejudicial Error was Committed in the Admission of Evidence Against the Petitioner

The petitioner's trial was conducted on the apparent assumption that anything ever said or written by any member of the Communist Party was admissible against him to prove the Party's unlawful aims.[76] The result was the

[76]The defense objected to the admission of such remote evidence from the very outset of the trial (Tr. 82, 114-15, 144, 159, and 161), but generally without success.

erroneous admission of much damaging evidence which was not binding on Scales, and much that was irrelevant to the issues in the case and highly inflammatory.

The three documents (G. Exs. 64, 65, and 66) relating to the Korean War were, beyond question, inflammatory and exceedingly prejudicial to the defendant. The prosecution did everything possible to exploit their emotional effect (R. A18-A22). The documents had no conceivable bearing on the issues in the case; nevertheless the trial judge permitted the prosecution to read to the jury such matter as the following (R. A21-A22):

> "As is often the case in Korea, the facts were worse than the rumor for at that time most Koreans were not acclimatized to the diabolical ruthlessness of the Americans and their puppets. Try to imagine Rangwul Valley, about five miles southeast of Taejon on the Yongdong Road. Hills rise sharply from a level floor about one hundred yards across and a quarter of a mile long. In the middle you can walk safely, though your shoes may roll on American cartridge cases, but at the side you must be careful for the rest of the valley is a thin crust of earth covering corpses of more than seven thousand men and women.
>
> "One of the party with me stepped through nearly to his hip in rotting human tissue. Every few feet there is a fissure in the topsoil through which you can see into a gradual sinking mass of flesh and bone. The smell is something tangible that seeps into your throat. For days after I could taste the smell. All along the great death pit, waxy dead hands and feet, knees, elbows, twisted faces and heads burst open by bullets, stick through the soil.
>
> "When I read of Nazi murder camps at Belsen and Buchenwald I tried to imagine what they were like. Now I know I failed . . .
>
> "American officers, with officers of the puppet army, went in jeeps on each day and supervised the butchery. Every witness agrees on this, and I asked several separately to show me where the jeeps and the

> Americans stood. There were emptied packets of American cigarettes lying around. All of the thousand cartridge cases on the ground were made in America. I picked up a handful of M-1 carbine cartridge cases which I have still. Every one was fired at a Korean, Korean patriot.
>
> "This was only one of the massacres carried out at American instructions."

The defense motion for a mistrial, made after this document was read to the jury (R. A23), was denied. Thereafter, the defense attempted to mitigate the prejudicial effect of this and other incompetent testimony by appropriate instructions to the jury[77], but these were refused.

There was a vast amount of other irrelevant testimony, perhaps not so gruesome but equally prejudicial. For example, nearly all of the Government's witnesses described Communist Party teachings concerning a so-called "Black Belt" of concentrated Negro population, throughout which the Negroes should be regarded as an oppressed "nation" with the right of self-determination (Lautner, R. 23; Mrs. Hartle, R. 163-67; Cummings, R. 451-52; Clonitz, R. 249; Reavis, R. 327-29; Jones R. 341-42; Childs, R. 383-84, 413, and 418-19). Yet the prosecution made no effort to relate this testimony to the advocacy of force and violence, or to show that the "doctrine" of the "Black Belt" was ever put forward in an action-inciting way.[78]

The vice of the evidentiary theory adopted below lies much deeper than these isolated examples suggest. The trial court treated the issue of the Communist Party's aims and objectives as entirely distinct from the issue of the appellant's knowledge of those aims. On this theory, the Court admitted unlimited testimony by the former Com-

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[77] Instructions Nos. 4, 5, 7, 18, and 21 (R. A32-A35).

[78] *Cf.* the similar evidence presented in *Herndon v. Lowry*, 301 U. S. 242, at 250-53, wherein the defendant's conviction of attempted insurrection was reversed.

munists who testified for the prosecution, even though the events they described were utterly remote from the defendant. Thus the entire first half (seven days) of the trial passed before the defendant's name was even mentioned (R. 244; Tr. 961). The 1945 national convention of the Communist Party in New York City, which is a crucial episode in the Government's case against the Communist Party, occurred while the defendant was serving in the armed forces of the United States in Bari, Italy (Tr. 1959).

In many law suits, of course, it may be important to establish the existence, non-existence, or nature of a circumstance in the observable world. The location and dimensions of a building, the height and weight of a man, the effective range of a revolver, the color and maximum speed of an automobile—such matters, we may assume at least for purposes of argument, may be shown by evidence regardless of whether or not the affected litigant is privy to it, and then the litigant's knowledge of the fact, if relevant, may be shown by evidence directed to his state of mind.

What, if anything, an organization advocates is ordinarily shown by its official acts in the form of constitution, by-laws, resolutions, and other officially approved publications and declarations. If in Smith Act cases against Communist Party members, the prosecution should attempt to prove *the Party's* unlawful advocacy by reference to its official pronouncements as an organization, there certainly would be no basis for objection on the ground that the defendant was not present at the time. Of course, it would still have to be shown that the defendant knew of the pertinent pronouncements, but ordinarily this would not be difficult if the pronouncements were of such a nature that they would come to the attention of all Party members as a matter of routine.

But it is not by such means that the Government has endeavored to prove the unlawful advocacy of the Com-

munist Party in the present case. This is for the simple but sufficient reason that the Party's official pronouncements do not advocate, and indeed expressly condemn the advocacy of, violent overthrow of the Government. The Party constitution adopted at the 1945 national convention expressly repudiates force and violence (G. Ex. 22; Tr. 438-40). The draft resolution adopted at the same convention (G. Ex. 23; Tr. 440-43) "is conspicuously free of any suggestion that the Party approved of inciting revolutionary force and violence." See *United States* v. *Silverman*, 248 F. 2d 671, 683 (C. A. 2). In 1948 the Party constitution was revised to provide for the expulsion from the Party of any member "who advocates force and violence or terrorism" (G. Ex. 32; Tr. 439-40).

Far from relying on the Party's official pronouncements, therefore, the Government's contention is that these are meretricious and self-serving disclaimers—"double talk" as Lautner put it (Tr. 439)—and that the Party's actual purposes must be ascertained from other evidence. And this "other evidence" consists almost entirely of the very third party declarations—whether in "classical" texts by Marx, Lenin, and Stalin, or in the opinion and hearsay testimony of witnesses such at Lautner and Mrs. Hartle—the admissibility of which is presently in question.

In approaching this problem it is important to bear in mind that the appellant and other defendants in Smith Act cases are not charged with conspiring or joining groups that intend to overthrow the Government,[79] but to *advocate* the duty and necessity of its overthrow. Conceivably the leaders of the Communist Party may in fact intend and attempt to bring this about. But the question is whether they propose to do this (at least in part) by means of advocacy. And this is not lightly to be assumed, for it is

[79] There is a distinct and much older federal statute prohibiting conspiracies to overthrow the Government by force (18 U. S. C. 2384)

altogether probable that governments are more often overthrown by groups which do not (at least openly) advocate violent overthrow, but proclaim their desire to protect the governments against the assaults and machinations of others.

If advocacy of violent overthrow is the only "substantive evil" at which the Smith Act is directed, and if (as is clear) the Communist Party established in 1945 does not in its official pronouncements so advocate but explicitly condemns such advocacy, the prosecution's charge against the appellant and other defendants in Smith Act cases comes down to this: that despite the categorical and contrary import of the Party's official pronouncements, the Party leaders *secretly* advocated violent overthrow among themselves and, perhaps, to others. And indeed this is precisely what the prosecution attempts to prove by means of the third-party declarations that are here under discussion.

But as soon as the issue is cast in this, its true shape, the incompetence and inadmissibility of the third-party declarations become apparent. If it is secret advocacy in contravention of open Party doctrine that is the basis of the charge, then it cannot be proved as against Party member A by what member B said to member C in A's absence. Nor can it be proved against member A by what member D wrote in a book, unless it is shown that A had read and understood the writing and knew it to embody the secret advocacy of the Party leadership. In fact, the issue is no longer "Party advocacy" in the customary organizational sense, but the secret advocacy of a group within the Party. Membership in that group cannot be proved against an individual by evidence of his membership in the Party, or by hearsay evidence of what other members were saying to each other or writing in books. See *Schneiderman* v. *United States*, 320 U. S. 118.

But the trial court imposed practically no bounds on the prosecution's scope and order of proof, or on the

evidence it offered about the Communist Party at any place and at any time during the course of this century. Defense objections on the grounds of lack of relevance or competence were summarily overruled (e.g. Tr. 101). The court allowed the prosecution to read extensively to the jury from documents, on the assumption that their connection with the defendant would be established later, despite defense objections that the reading should await connection (Tr. 158-60).

The prosecution subsequently established a connection between the defendant and a number of the Party documents, but much of its evidence could not possibly be connected. How could a connection be shown between the teaching at a Party school attended by Lautner in New York in 1930 (R. 7-16; Tr. 87-105) when the defendant, in Greensboro, was not yet of high school age? Why should Scales be bound by Mrs. Hartle's testimony about unemployed workers' demonstrations during that same year (R. 149-50; Tr. 604-05), or her story of Communist control over the personal lives of a few individuals in Seattle (Tr. 723)? Yet these are but two examples of a staggering volume of testimony about persons and events far removed from the defendant, and generally irrelevant to the issues in the case.

To be sure, a federal district judge has a considerable range of discretion with respect to the order and scope of proof at a trial. But in this case the discretion was abused to a degree that hopelessly prejudiced the defendant. It is too much to expect that a jury which has heard a full week of testimony about the Communist Party "subject to connection" will be able to lay it all to one side, and give weight only to such portions as are later made binding on the defendant. Nor, under such circumstances, can the jury be expected to winnow the few kernels of material evidence from the chaff of erroneous and prejudicial testi-

mony about "Black Belts," the Stockholm peace appeal (R. 186-88), and American policy in China (R. 188-89; Tr. 666-70).

Having objected unsuccessfully, the defense subsequently moved to strike the testimony of Lautner, Mrs. Hartle and the other three witnesses to whom the appellant was a total stranger and who knew nothing of his actions and statements. The motion was denied (Tr. 1828). The defense then requested instructions (R. A32-A35) which might have mitigated the prejudicial effect of the erroneous evidentiary rulings, and excepted to certain portions of the charge which aggravated the prejudice (R. A47-A48; Tr. 2214-16). But the court refused to charge as requested by the defense, and the short supplementary charge given following the defense exceptions (R. A48) was altogether insufficient to correct the situation. The erroneous and prejudicial character of the evidentiary rulings is clear, and the judgment of conviction must be reversed.

## CONCLUSION

The statute under which Scales has been convicted is in conflict with the overall pattern of legislation in the field of national security, as Congress soon realized when it was shaping the Internal Security Act of 1950. Whether or not the registration provisions of that Act are either wise or constitutional is not here at issue. Wise or unwise, they embody the deliberate purpose of Congress. Manifestly, that purpose would be most effectively frustrated by the constitutional consequences of enforcing the membership clause against Communists. This danger was clearly perceived in Congress, and steps were taken to ward it off by language added to the Act for that specific purpose. It is remarkable that the Government should have embarked on prosecutions such as this one, so patently at war with Con-

gressional purpose and so dangerous to the effective administration of the Internal Security Act.

The membership clause itself does not embody the considered judgment of Congress, but merely a hasty copying from state statutes enacted in a period not notable for calm or reflective judgment. As Justice Brandeis remarked,[80] the statute undertakes to punish "association with those who propose to preach" a doctrine. As a concept of criminal liability this is novel, noxious, and unnecessary, and this Court should give it no countenance.

It is respectfully submitted that the judgment of the court below should be reversed.

February 26, 1959

TAYLOR, SCOLL & SIMON
400 Madison Avenue
New York 17, N. Y.

SMITH, MOORE, SMITH
SCHELL & HUNTER
Jefferson Standard Building
Greensboro, North Carolina
*Attorneys for Appellant*

TELFORD TAYLOR,
MCNEILL SMITH,
*Of Counsel.*

[80] *Whitney* v. *California*, 274 U. S. 357, 373.

# APPENDIX

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitution of the United States:

1. Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

2. Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

B. Statutes

1. 18 U. S. C. Section 2385 (the Smith Act):

Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officers of any such government; or

Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

2. 50 U. S. C. Section 783 (the Internal Security Act of 1950):

(a) It shall be unlawful for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship, as defined in paragraph (15) of section 782 of this title, the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization, or foreign individual: *Provided, however,* That this subsection shall not apply to the proposal of a constitutional amendment.

* * *

(c) It shall be unlawful for any agent or representative of any foreign government, or any officer or member of any Communist organization as defined in paragraph (5) of section 782 of this title, knowingly to obtain or receive, any attempt to obtain or receive, directly or indirectly, from any officer or employee of the United States or of any department or agency thereof or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, any information of a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States, unless special authorization for such communication shall first have been obtained from the head of the department, agency, or corporation having custody of or control over such information.

* * *

(f) Neither the holding of office nor membership in any Communist organization by any person shall

constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 787 or section 788 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute.

3. 50 U. S. C. Sections 841 and 843 (the Communist Control Act of 1954):

Section 841. The congress finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritation dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through the public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchial chieftains. Unlike political parties, the Communist

Part acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed.

Section 843. (a) Whoever knowingly and willfully becomes or remains a member of (1) the Communist Party, or (2) any other organization having for one of its purposes, or objectives the establishment, control conduct, seizure, or overthrow of the Government of the United States, or the government of any State or political subdivision thereof, by the use of force or violence, with the knowledge of the purpose or objective of such organization shall be subject to all the provisions and penalties of the Internal Security Act of 1950, as amended, as a member of a "Communist-action" organization.

(b) For the purposes of this section, the term "Communist Party" means the organization now known as the Communist Party of the United States of

America, the Communist Party of any State or subdivision thereof, and any unit or subdivision of any such organization, whether or not any change is hereafter made in the name thereof.

4. 28 U. S. C. Section 1861 (Qualifications of jurors):

Any citizen of the United States who has attained the age of 21 years and resides within the judicial district, is competent to serve as a grand or petit juror unless:

(1) He has been convicted in a state or federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

(2) He is unable to read, write, speak and understand the English language.

(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service.

(4) He is incompetent to serve as a grand or petit juror by the law of the State in which the district court is held.*

5. 28 U. S. C. Section 1864 (Manner of drawing names of grand and petit jurors):

The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing.

---

*Section 9.1 of the General Statutes of North Carolina states that a juror must be a person who resides in the county, who is over 21 years of age and who is "of good moral character" and has "sufficient intelligence to serve as a member of grand and petit juries." The statute excludes from any jury service all those "who have been convicted of any crime involving moral turpitude or who have been adjudged to be *non compos mentis*".

The jury box shall from time to time be refilled by the clerk of court, or his deputy, and a jury commissioner, appointed by the court.

* * *

The jury commissioner and the clerk, or his deputy, shall alternately place one name in the jury box without reference to party affiliations, until the box shall contain at least 300 names or such large number as the court determines.

* * *

6. Public Law 85-269; 71 Stat. 595.

Chapter 223 of title 18, United States Code, is amended by adding a new section 3500 which shall read as follows:

"§ 3500. Demand for production of statements and reports of witnesses

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

"(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

"(d) If the United States elects not to comply with an order of the court under paragraph (b) and (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

"(1) a written statement made by said witness and and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

Approved September 2, 1957.

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JAMES R. BROWNING, Clerk

No. [redacted]/8

# In the Supreme Court of the United States

OCTOBER TERM, 1958

JUNIOR IRVING SCALES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
J. WALTER YEAGLEY,
Assistant Attorney General,
KEVIN T. MAROONEY,
PHILIP R. MONAHAN,
Attorneys,
Department of Justice, Washington 25, D.C.

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# In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 488

JUNIUS IRVING SCALES, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The opinion of the Court of Appeals (R. 455–495)[1] is reported at 260 F. 2d 21.[2]

### JURISDICTION

The judgment of the Court of Appeals was entered on October 6, 1958 (R. 495). The petition for a writ

[1] "R." will be used herein to refer to the printed record. "Tr." will refer to the reporter's transcript, and "G. Ex." to the Government's exhibits.

[2] The opinion of the Court of Appeals affirming the judgment of conviction rendered following petitioner's first trial under this indictment is reported at 227 F. 2d 581, and the *per curiam* opinion of this Court reversing that judgment (on the authority of *Jencks* v. *United States*, 353 U.S. 657, and the Solicitor General's confession of error) is reported at 355 U.S. 1.

of certiorari was filed on November 3, 1958, and granted on December 15, 1958 (R. 496). The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the "membership" clause of the Smith Act (18 U.S.C. 2385) is unconstitutional on its face or as applied to the facts of this case.

2. Whether Section 4(f) of the Internal Security Act of 1950 (50 U.S.C. 783(f))—which provides in part that neither "the holding of office nor membership in any Communist organization by any person shall constitute per se a violation" of that or any other criminal statute—modified, amended, or repealed the "membership" cause of the Smith Act so as to render it inapplicable to this case.

3. Whether the evidence was sufficient to support the verdict.

4. Whether petitioner was denied a fair trial because of

(a) the composition of the grand jury which indicted him;

(b) the legislative findings of fact concerning the Communist Party as set forth in the Internal Security Act of 1950 (50 U.S.C. 781) and the Communist Control Act of 1954 (50 U.S.C. 841);

(c) the application at the trial of the "excision" provisions of the so-called "Jencks" Act, 18 U.S.C. 3500 (directing that, before statements by prosecution witnesses in the Government's possession are turned over to the defense for cross-examination purposes, the court, after *in camera* inspection, excise portions

which do not relate to the subject matter of the testimony of the witnesses); or

(d) the admission of certain evidence offered by the prosecution.

## STATUTES INVOLVED

The Smith Act (18 U.S.C. 2385), in its form applicable to this case,[3] provided:

> Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or
>
> Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or
>
> Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the

[3] The statute has since been amended by the Act of July 24, 1956, c. 678, § 2, 70 Stat. 623, to provide for an increase of the maximum fine from $10,000 to $20,000 and an increase in the maximum sentence from 10 to 20 years. In addition, this most recent amendment reinstated as part of Section 2385 of Title 18 the special conspiracy provision which had been repealed when the Criminal Code was revised in 1948.

overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

The text of the Smith Act, together with relevant provisions of the Constitution of the United States, the Internal Security Act of 1950, the Communist Control Act of 1954, the "Jencks" Act (18 U.S.C. 3500), and pertinent statutes concerning the qualifications and the empanelling of jurors (28 U.S.C. 1861, 1864), are set forth in the Appendix to Petitioner's Brief, pp. 1a–9a.

## STATEMENT

On November 18, 1954, petitioner was charged in an indictment (R. A2) returned in the United States District Court for the Middle District of North Carolina with having violated the so-called "membership clause" of the Smith Act, 18 U.S.C. 2385, proscribing being or becoming a member of a society, group, or assembly of persons who teach, advocate, or encourage the overthrow by violence of the Government of the United States, knowing the purposes thereof (*supra*, pp. 3–4). Specifically, the indictment charged him with having been, from in or about January 1946 to and including the date of the filing of the indictment, a member of the Communist Party of the

United States, a society of persons who allegedly "teach and advocate the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit," well knowing that the said Party was and is such a society, and "said defendant intending to bring about such overthrow by force and violence as speedily as circumstances would permit" (*ibid.*).

On April 21, 1955, following a trial by jury, petitioner was found guilty and was thereafter sentenced to six years' imprisonment. On November 7, 1955, the Court of Appeals for the Fourth Circuit affirmed the conviction. *Scales* v. *United States,* 227 F. 2d 581. On March 26, 1956, this Court granted certiorari. 350 U.S. 992. On June 3, 1957, following the submission of briefs on the merits and oral argument, this Court ordered the case to be restored to the docket for reargument. 353 U.S. 979. In September 1957, the Government filed a supplemental memorandum which, *inter alia,* pointed out that petitioner was entitled (at least) to a new trial under the rationale of *Jencks* v. *United States,* 353 U.S. 657 (Supplemental Memorandum for the United States on Reargument, Nos. 3 and 4, Oct. Term, 1957, pp. 1-2). On October 14, 1957, this Court, citing the *Jencks* decision, *supra,* entered an order reversing the Fourth Circuit's affirmance of petitioner's conviction "[u]pon consideration of the entire record and the confession of error by the Solicitor General." *Scales* v. *United States,* 355 U.S. 1.

Petitioner was thereafter re-tried and, on February 21, 1958, again convicted and sentenced to six

years' imprisonment (R. A49; Tr. 2217). On appeal to the Court of Appeals for the Fourth Circuit, the judgment of conviction was, on October 6, 1958, affirmed (R. 495). On December 15, 1958, this Court granted certiorari (R. 496).

The evidence adduced at petitioner's second trial may be summarized as follows:

A. GENERAL EVIDENCE (NOT SPECIFICALLY LINKED TO PETITIONER) ESTABLISHING THE CHARACTER OF THE COMMUNIST PARTY AS AN ORGANIZATION WHICH DURING THE INDICTMENT PERIOD TAUGHT AND ADVOCATED THE FORCIBLE OVERTHROW OF THE GOVERNMENT OF THE UNITED STATES AS SPEEDILY AS CIRCUMSTANCES WOULD PERMIT

A mass of evidence was introduced to prove that the Communist Party, during the entire indictment period (1946–1954), taught and advocated the forcible overthrow of the Government of the United States as speedily as circumstances would permit. We set forth in Appendix A, *infra*, pp. 121–139, a summary of so much of this evidence as was not specifically linked at the trial to the petitioner, but directed generally to the character and activities of the Communist Party as an organization knowing membership in which is proscribed by the Smith Act.

B. EVIDENCE, SPECIFICALLY LINKED TO PETITIONER, FURTHER ESTABLISHING THE CHARACTER OF THE PARTY AS AN ADVOCATE OF FORCE AND VIOLENCE, AND SHOWING PETITIONER'S KNOWLEDGE OF THAT CHARACTER AND HIS INTENT WITH RESPECT TO VIOLENT OVERTHROW AT THE EARLIEST FEASIBLE OPPORTUNITY.

Petitioner, commencing in or before 1948, and continuing throughout the indictment period, was the

Chairman of the North and South Carolina Districts of the Communist Party (R. 388–389; Tr. 962, 1585)—the "District" being the largest geographical division in the Party below the national organization itself (R. 66–67; Tr. 279–280). As such, he regularly reported to the National Committee on the activities of the Party in his District and saw to it that the directives of the National Committee were carried out in that area (R. 389; Tr. 1585–86); recruited new members into the Party (R. 257–258; Tr. 1007, 1579); selected and made arrangements for promising Party members to further their education in Marxism-Leninism by attending the Jefferson School of Social Science, which the Party conducted in New York (R. 271–274, 320–323; Tr. 1031–32, 1037, 1039, 1306–1309); received the plaudits of William Z. Foster, the Party's National Chairman, for his work in the Party's behalf in the Carolinas (Tr. 1082); and was the director of a Party training school for "outstanding cadres in the North Carolina area" (R. 396–398; Tr. 1603–1605). On occasion, he privately tutored promising prospective recruits in the fundamentals of Marxism-Leninism (R. 249–252; Tr. 980–995). In December 1951, he disappeared into the Communist underground (R. 307, 334; Tr. 1122–23, 1335–1336). The evidence further showed that petitioner was familiar with substantially all of the basic Marxist-Leninist "classics" which the Government introduced, in supplementation of its proof as adduced through its living witnesses, to show the revolutionary nature and purposes of the Communist Party. Specifically, he was shown to be familiar with the following texts: *Foundations of*

*Leninism* (G. Ex. 5, Tr. 112; R. 259, 262; Tr. 1010, 1014); *Problems of Leninism* (G. Ex. 42, Tr. 971; R. 262–263; Tr. 1014–1015); *State and Revolution* (G. Ex. 16, Tr. 184; R. 248; Tr. 970–971); *History of the Communist Party of the Soviet Union* (G. Ex. 19, Tr. 213; R. 397–398; Tr. 1604–1605), and *Ten Classics of Marxism* (G. Ex. 114, Tr. 1607; R. 397–398; Tr. 1604–1605).

The evidence summarized below, unlike that summarized in Appendix A (*infra*, pp. 121–139), relates exclusively to petitioner's own statements and actions. In addition to constituting further evidence—supplementing that set forth in Appendix A—of the character of the Communist Party as an organization which advocates the violent overthrow of the Government of the United States at the earliest feasible opportunity, it tends to show petitioner's personal knowledge of, intent with respect to, and activities in furtherance of, the Party's violent revolutionary aims and purposes.

In September 1948, witness Clontz, while a law student at Duke University, wrote to petitioner stating that he was interested in Communism (R. 244; Tr. 961). Petitioner sent Clontz a box of Communist literature and a letter in which he stated that he would be glad to discuss any matter relating to the Party and its activities (G. Ex. 41, Tr. 962–963; R. 245; Tr. 961–962). In that same month, Clontz got together with petitioner at a conference at which petitioner explained to Clontz the Party's basic strategy (R. 248–249; Tr. 980). This meeting was followed by other similar sessions, held from time to time over

the next several years (R. 262, 290–291; Tr. 964, 1014, 1077–78).

There were, petitioner told Clontz, "two classes of people in this country" who "could be used by the Communist Party to foment a revolution" (R. 249; Tr. 981). The first was "the working class or Proletariat," of whom the Communist Party was the leader (*ibid.*). The second was what petitioner termed "the Negro nation," consisting of a "Black Belt" of "thirteen Southern States" (*ibid.*; R. 250; Tr. 986–987). The "basic strategy of the Communist Party," said petitioner, was, by bringing "the working class, led by the Communist Party" and the "Negro nation" together, "to bring about a forceful overthrow of the Government" (R. 249; Tr. 981).

In a discussion which petitioner had with Clontz shortly before Christmas 1948, petitioner told Clontz how Communism would come into power in the United States (R. 246–247; Tr. 967–969). Clontz had suggested that, "with as wonderful a system as communism offered," the Party should "educate the people" as to the benefits of Communism so that "the people would vote in a Communist form of government" (R. 246; Tr. 967). Petitioner "answered that that was completely impossible" and "completely fallacious" because "the Government controlled all of the media of communication, the newspapers, the radio, * * * the institutions of government, including the Army, the police powers, [and] the educational system" (R. 246; Tr. 968). The idea that Communists could convert the masses "by an educa-

tional process," according to petitioner, was "idealism" (*ibid.*). "Idealism," petitioner explained to Clontz (R. 246–247; Tr. 968–969)—

> * * * was a doctrine that Stalin and William Z. Foster had shown to be completely false, that as long as the institutions of government stood and were not overthrown, that ideas could absolutely do nothing.
>
> He [petitioner] said that he and the other followers of Stalin believed that you could use the institutions of government, once you had taken them over, to get across the ideas to the people. But, the defendant said that a militant force would have to force a change in government and at that point he said that is where we come in.

"[I]t would be nice," said petitioner (R. 263–264; Tr. 1017),—

> * * * if revolutionary ideas would automatically produce a revolution. But * * * it was impossible, that a militant force would have to bring about the revolution and that force was the only answer.[4]

---

[4] On cross-examination, Clontz was asked if petitioner had not once told him that the Communist Party "does not advocate the overthrow of the United States Government by force and violence. On the contrary, they simply know that the monopolists will soon resort to force to thwart the will of the masses of the workers. When this happens, we will have to meet their force with force" (Tr. 1202–1203). Clontz replied that petitioner had explained the Party's attitude toward force in those terms in their "first meetings," but that he "later explained to me that that was the Communist double talk that was put out for the purpose of misleading * * * people of liberal leanings" (Tr. 1203). "The explanation given by the Party for public consumption," Clontz testified, "was that the

Petitioner, at this meeting, furnished Clontz with Communist Party literature, including Lenin's *State and Revolution* (G. Ex. 16, Tr. 184) and Stalin's *Problems of Leninism* (G. Ex. 42, Tr. 971) (R. 248; Tr. 970–971). In the former of these works Lenin stated that "the liberation of the oppressed class is impossible not only without a violent revolution but also without the destruction of the apparatus of State power * * *" (Tr. 975), and that revolution "is an act in which one section of the population imposes its will on the other by means of rifles, bayonets, cannon * * *"; the Paris Commune[4] was used as an example (Tr. 975–976). Clontz testified that petitioner told him that one of the reasons why he should read Communist Party literature was that it would "help prepare [him] for the time when the Communist Party would call on [him] in time of crisis" (R. 313; Tr. 1151–1152).

In July 1949, petitioner showed Clontz the dedication of a book, *Twilight of World Capitalism*, by William Z. Foster, the Party's National Chairman, in which Foster stated that his great grandson "would live in a Communist U.S.A." (R. 250–251; Tr. 993). Petitioner "told me [Clontz] that there was a depres-

way the revolution would come about was that the people would vote in a Communist regime, at which time the capitalists would bring the armies and the police powers to overthrow the people's government and at that time the people's workers would meet force with force" (*ibid.*). This, however, Clontz was told by Party initiates, including petitioner, was merely "one of the formulations used by the Communist Party to conceal their actual methods, their actual purpose and their actual beliefs" (Tr. 1203–1204).

[4] See Appendix A, *infra*, p. 129.

sion coming, * * * that Communists would suffer probably more than anyone else in the * * * depression, but that they actually reveled in the depression because it gave them an opportunity to reach people that during prosperous times they couldn't even reach, and Scales remarked that if a depression came, William Z. Foster's grandson wouldn't have to wait so long * * * [f]or the revolution" (R. 251; Tr. 993-994).

In November 1949, petitioner told Clontz that he had "the definite feeling" that it would not be long before "things would pop" in this country (R. 251-252; Tr. 994-995). He "explained the basis for his feeling" by saying that he (R. 252; Tr. 995)—

> * * * just had been reading in some book which he didn't identify, the writings of Lenin back in 1917 and 1918; he said that the situation in Russia in that particular time and in the United States, in 1949, was a direct analogy. He said that Lenin had pointed out in his writings around the first part of the year that the Communists were a minority, that they were outnumbered, that they were weak, but that Lenin had still expressed hope.
>
> He said that Lenin had pointed out in July of that same year the Communists were outlawed, the Bolshevik Party, that is, were outlawed, and driven completely underground. Yet, he said, Lenin had pointed out that that very next October was the famous Russian October Revolution. Scales said that he saw exactly the same analogy here. Scales said that he did not foresee a bloody revolution soon, but

that it would come inevitably exactly as it had in the Soviet Union.

On January 17, 1950, petitioner officially received Clontz into the Communist Party as a secret member-at-large (R. 257–258; Tr. 1007). He told Clontz that he would continue his "private tutoring" of Clontz as a member-at-large and instructed him to continue his Marxist-Leninist studies, with "particular emphasis" on Stalin's *Foundations of Leninism* (R. 259; Tr. 1009–1010). In addition, at or about that time, petitioner gave Clontz "an outline" of *Foundations of Leninism* which he told Clontz he had "personally prepared" (R. 262; Tr. 1014). Thereafter Clontz would from time to time study the outline and the book and "would meet to recite to [petitioner], who in turn would give me the correct Party interpretation of those particular things" (*ibid.*).*

In February 1950, while petitioner was continuing to give Clontz private instructions to prepare him for future work in the Party and possibly to form an underground cell in Charlotte, North Carolina, Clontz asked him when he thought the "revolution" would come (R. 259–260; Tr. 1011). Petitioner replied that, while he did not think it would come in the immediate future, he "could say definitely that [Clontz'] daughter, who then was fourteen months old, would

* In *Foundations of Leninism*, one of the basic Marxist-Leninist "classics," Stalin taught, among other things, that "The dictatorship of the proletariat cannot arise as the result of the peaceful development of bourgeois society and of bourgeois democracy; it can arise only as the result of the smashing of the bourgeois state machine * * *" (G. Ex. 5, p. 54). Repudiating with Lenin the "possibility of the peaceful evolu-

marry in a Socialist or Communist United States" (*ibid.*).[1]

Following this discussion, petitioner and Clontz were joined by Bernard Friedland, the District Organizer for the Party in North and South Carolina (R. 260–261; Tr. 1012). In petitioner's presence Friedland questioned Clontz extensively concerning his background and reasons for joining the Communist Party (R. 261; Tr. 1013). He asked Clontz "why as an attorney [he] had not sought out reform, to reform the system, if [he] felt that the system of government we had was wrong" (R. 262; Tr. 1013-1014). Clontz (R. 262; Tr. 1014)—

> replied to Friedland that Scales had taught me that the entire court system, the entire system of justice in this country was so completely evil that only by overthrowing the whole government and doing away with it could we ever have justice * * *.

This answer "apparently satisfied" Friedland and petitioner (*ibid.*).

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tion of bourgeois democracy into a proletarian democracy" in "England and America" (*id.*, pp. 55–56), he stressed that "the law of violent proletarian revolution, the law of the smashing of the bourgeois state machine" was "an inevitable law" in all "imperialist countries," including the United States, and proclaimed that Lenin was "right in saying" that "The proletarian revolution is impossible without the forcible destruction of the bourgeois state machine" (*id.*, p. 56).

Elsewhere in the same work, Stalin defined "Strategy" as "the determination of the direction of the main blow of the proletariat at a given stage of the revolution * * * (*id.*, p. 90; read to jury at Tr. 1027).

[1] Petitioner used the terms "communism" and "socialism" interchangeably in his conversations with Clontz (R. 266; Tr. 1020–1021).

In March 1950, at another study and discussion session, petitioner "brought to [Clontz'] attention" the following passage from Stalin's *Problems of Leninism* (R. 263; Tr. 1016):

> Can such a radical transformation of the old Bourgeois order be achieved without a violent revolution, without the dictatorship of the Proletariat? Obviously not. To think that such a revolution can be carried out peacefully within the framework of Bourgeois democracy, which is adapted to the rule of the Bourgeoisie, means that one has either gone out of one's mind and lost normal human understanding, or has grossly and openly repudiated the Proletarian revolution.

Petitioner "pointed out this particular passage as simply proving * * *, as he already had taught, that education and reform would accomplish absolutely nothing, but that revolution, a violent revolution was the only possible way to bring about a change in the form of government" (*ibid.*).

At this same session, petitioner, referring to another passage from *Problems of Leninism,* told Clontz that "this contained the explanation of why a revolution would be easier here" than it had been in Russia (R. 264; Tr. 1018). Whereas "in the Soviet Union there had been no one to help the Soviet Party," petitioner explained (R. 264–265; Tr. 1018–1019),—

> * * * in this country when the revolution started, we would have the benefit of the help from the mother country, Russia, in bringing about our own revolution, because part of the purposes of the Communist Party in the Soviet

> Union was international in scope and that we naturally would continue to receive help in all circumstances from the Soviet Party when the revolution was started here in this country.

Clontz asked petitioner (R. 265; Tr. 1019)—

> * * * what kind of help we would expect. I asked him whether troops were going to be landed or just exactly how we would get help.

Petitioner replied that "we could not expect the Soviet Union to land troops to start our revolution," since "experience had taught the Communists that that sort of approach was disastrous" (*ibid.*). He cited the Communists' experience in China, where, when the Russian Communist Party, originally, "sent in Russian generals," "the Chinese Communists had been licked completely" (*ibid.*). The "new approach"—which had resulted in the successful Chinese Communist Revolution under Mao-Tse-Tung, who "had never even been to Russia"—was for the Russian Communist Party to send "military leaders" and "professional revolutionaries" to assist native Party leaders in "bringing about their [own] revolution" (R. 265; Tr. 1019–1020). Consequently, said petitioner, "we Communists in this country would have to start the revolution, and we would have to continue fighting it" (R. 265; Tr. 1019). On the other hand, he pointed out, "we could count on drawing on the experience of the Soviet Union," which "would furnish us when the revolution came with experienced revolutionaries from Russia" (R. 265; Tr. 1020). "[O]ne thing" that was "certain," petitioner said, was that (R. 266; Tr. 1020)—

> * * * if the United States declared war on the Communists in their revolution, then the Soviet Union would land troops, and * * * that would be a bloody time for all.

Also at this meeting petitioner told Clontz that there was a "basic difference" between the Communist Party and "labor unions" (R. 266; Tr. 1020). Labor unions, he said (*ibid.*)—

> didn't have the advantage the party had, of being able to see beyond the next hill. * * * [A] labor union could only see to the next hill, whereas the Communist Party could see all the way over and could see the ultimate goal, the Communist Party United States.

In June 1950, petitioner made arrangements for Clontz to attend the Jefferson School of Social Science in New York, which he described as "patterned after a National Party School he had attended" (R. 271; Tr. 1031–1032). He told Clontz he would have to use an alias while at the school, since "no communist going up to New York to this school from out of the state registered under their right names" (R. 273–274; Tr. 1037–1038). On August 5, 1950, Clontz left for New York to begin his studies, which lasted approximately three weeks (R. 274; Tr. 1045, 1055). During the second and third weeks, Clontz was privately tutored by Doxey Wilkerson, the Director of Curriculum and liaison officer between the school and Communist Party headquarters (R. 297; Tr. 1055, 1101). (Wilkerson's statements to Clontz as to the Party's position with respect to the use of force and violence in achieving its objectives are summarized in

Appendix A at pp. 134–137, *infra.*) On his return to North Carolina, Clontz discussed in detail the teachings of the Jefferson School with petitioner and Henry Farash, the Party Organizer for North and South Carolina, who worked under petitioner's immediate supervision (R. 293, 300; Tr. 1081, 1106–1107). Clontz read to them his notes on the subject matter of his classes, "showed them the various diagrams, such as the formula for force and violence [see *infra*, pp. 135–136], and commented to them how much more effective the presentation was with the various charts that Doxey Wilkerson had used" (R. 293; Tr. 1081). Clontz "agreed with them that it was the same thing they'd been teaching me, but that I felt it was a little better taught at the Jefferson School because of the better teaching aids that they had there" (*ibid.*).

At the same meeting, petitioner and Farash discussed Clontz' future Party assignments with him; it was decided that Clontz would continue on as a secret Party member and eventually become a member of an Underground Club which was to be organized (R. 292; Tr. 1079–1080). In September 1951, petitioner discussed with Clontz the Party's plans for setting up an underground means of communication (R. 301–302; Tr. 1111–1113). He told Clontz that the Party "was growing more and more like an iceberg with a tenth of it or a hundredth of it above the surface but the vast majority of it hidden and concealed underground" (R. 303; Tr. 1113). In December 1951, petitioner himself was ordered by the national Party headquarters to go underground (R. 307–308; Tr. 1123, 1126). However, he continued to

serve as Chairman of the Party's Carolina District until at least as late as the time of his arrest under the indictment in this case (see Tr. 1519, 1532).

Government witness Reavis testified that in May 1949 he attended the Jefferson School of Social Science, the Party-operated school in New York City concerning which Clontz also testified (*supra*, pp. 17-18) (R. 320-331; Tr. 1306-1331). Reavis, like Clontz, attended the School at the suggestion of petitioner (R. 320-321; Tr. 1306-1307), who gave him detailed security precautions and instructions as to "where to go in New York, and who I was to call for, and what I was to do in case of an emergency" (R. 322-323; Tr. 1308-1309). At the School, Reavis received further precautionary instructions designed to safeguard his "own security" and the "security of the school" (R. 330; Tr. 1330). For example, the students "were told not to all leave the building as a group," "to go in ones and twos to lunch," to put any books they must carry "in newspapers," not to "talk to people" they lived with, etc. (R. 330; Tr. 1330-1331).

Government witness Childs testified that in October 1950 he was invited by Farash, the Party District Organizer for North and South Carolina, on behalf of petitioner, to become a Party member (Tr. 1578-1579). Two weeks later he was received into the Party, and was assigned by petitioner to work in and try to recruit members for the Labor Youth League (R. 387-388; Tr. 1580-1581, 1584), the Party's youth arm (R. 381; Tr. 1560). Childs purchased from petitioner on this occasion a quantity of Party litera-

ture, including Stalin's *Problems of Leninism* (G. Ex. 6, Tr. 116) (Tr. 1584–1585).

In July 1952, Childs, who was at that time an employee of the Western Electric Company in Winston-Salem, showed petitioner a pamphlet, entitled *Our Own Communists Can Cripple Us,* which the Company had placed in one of its reading racks for its employees to read (R. 392–393; Tr. 1596–1597). Petitioner, after examining the pamphlet, told Childs that "we should keep a list of the authors of these books and shoot them some day" (R. 393; Tr. 1597).

Also on this occasion petitioner urged Childs, who had indicated that he was "planning to return to school",* to "stay at Western Electric" and become a "leader among the workers" there (R. 393–394; Tr. 1597). Indicating that the Party was "expect[ing] a crisis" in the near future, when it was thought that "things would * * * come to a head," petitioner told Childs that it was more important from the Party's standpoint that he "remain in the industry" and "gain the road of leadership among the broad mass" of the workers than that he complete his education (R. 393–394; Tr. 1597–1598). In this connection he told Childs that "we did not want the Red Army to have to liberate us, meaning by that * * * that if the Communist Party does not have a broad mass able to lead a broad mass of the people in a revolution, then * * * these leaders of the revolution will be placed in

*Childs had been enrolled in High Point College from 1948 to 1950, quitting at the end of his second year to go to work (Tr. 1544). In September 1952, he entered the University of North Carolina, where he was still a student at the time of his testifying (Tr. 1545).

the jail and then it will be necessary for the Russian Army or the Red Army to come to the United States to liberate these leaders" (R. 394; Tr. 1598). "The trade unions," petitioner further told Childs in this conversation, "are the schools of revolution" (R. 395; Tr. 1600).

In August 1952, Childs was selected by petitioner to attend a "Party training school for outstanding cadres in the North and South Carolina and Virginia Districts of the Communist Party" (R. 396–399; Tr. 1603–1605). Petitioner was the director of the school (R. 398; Tr. 1605), which was conducted on the farm of a Party member at Walnut Cove, near Winston-Salem (R. 400; Tr. 1609). The students at the school were subject to strict security precautions (R. 398; Tr. 1605). False names were assumed, and no one was permitted to tell other Party members where he was going, make telephone calls, send or receive mail, or leave the school before it was over (Tr. 398, 400–401; Tr. 1605, 1609).

Childs was instructed by petitioner to bring with him to the school copies of the *History of the Communist Party of the Soviet Union* (G. Ex. 19, Tr. 213) and *Ten Classics of Marxism* (G. Ex. 114, Tr. 1607) (R. 397–398; Tr. 1604–1605). The students were assigned readings in these Marxist-Leninist classics, which were later discussed by the group (R. 403–407, 417; Tr. 1613–1618, 1631–1632).

Among the subjects discussed at the school was "how to Bolshevize" the Party (R. 417; Tr. 1632). Bob Handman, the District Organizer for the Virginia District, led the discussion on "Party building" (R. 424; Tr. 1663). He taught that the role of the

Party is to lead the masses in a "broad coalition" resulting in the "overthrow of the capitalist government" (R. 425; Tr. 1664). One of the weaknesses which prevented the Party from attaining this goal, he said, was the insufficiency of its industrial concentration program, *i.e.*, the program of infiltration of key industries and plants by Party members for the purpose of forming Party cells and controlling the unions in such industries (R. 425–427; Tr. 1664–1667). Nothing was said at the school, Childs testified, concerning any need for the Communist Party to become a "majority party" in order to attain its goal (R. 426; Tr. 1666). Handman, in the presence of petitioner, once gave a demonstration of jujitsu, and also demonstrated "how to kill a person with a pencil" (R. 432; Tr. 1680). Stating to those present that they "might be able to use this on a picket line," he demonstrated a method of thrusting a wooden pencil through a person's chest or throat (R. 432; Tr. 1680–1681).

Petitioner once "arranged a private meeting between the staff of the school and" Childs, the purpose of which was again to emphasize to Childs that, rather than return to college, he should retain his job with Western Electric (R. 429–430; Tr. 1671–1672). The staff pointed out to Childs that "the Party program was industrial concentration" and that it was essential that he "remain in industry" in order to "keep a contact with the broad masses of the people" (R. 430; Tr. 1671).

At a party which was held at the conclusion of the Walnut Cove School, petitioner said that there would

be "socialism" in this country by the time that the "grandchildren" of one of the persons present—who then had children ranging in age from ten to four—were born (Tr. 1674–1675). A feature of the party was a cake with a "great big red star" on it, prepared by the wife of the owner of the farm where the School was held, who remarked at the party that "that would be a good time for the F.B.I. to come in" (Tr. 1673).

In the spring of 1953, at a meeting of a Party Club which Childs attended at the home of a Party member named Betsy Van Camp (Tr. 1689), petitioner accused Betsy of being "confused" about "the purpose of a Communist Party Club" (Tr. 1692). "[T]he Party Club," he said, "is not for just the Bourgeois Revolution but for the ultimate Proletariat Revolution" (*ibid.*).

## SUMMARY OF ARGUMENT

### I

The membership clause of the Smith Act is valid on its face and as applied in this case. Under the principles enunciated in *Dennis* v. *United States*, 341 U.S. 494, and reaffirmed in *Yates* v. *United States*, 354 U.S. 298, there is no basis for the contention that, while Congress could punish conspiracy to organize a group which, like the Communist Party of the United States (as shown by the evidence in this case), advocates the violent overthrow of this Government in the sense of a call to forcible action, it was powerless to proscribe knowing, purposive, active—and here, high-level—membership in such a group from which alone the

organization derives its power to work towards the accomplishment of its violent objective.

A. *Validity of the clause on its face.*—1. The familiar history which was before the Court in *Dennis*—and see Mr. Justice Jackson's concurring opinion in *American Communications Assn.* v. *Douds,* 339 U.S. 382, 422, *et seq.*—gave solid ground for the judgment of Congress in 1940 that Communist, Nazi, and Fascist organizations were dedicated to principles of force and violence. The years since 1940 have confirmed that judgment. The experience of countries like Czechoslovakia and Poland has tragically demonstrated how minority groups like these, by tactics of infiltration and with the aid of their foreign alliances, can destroy free institutions with a coup when the time is ripe. There has been powerful evidence of Communist Party espionage in this and other countries on behalf of a foreign power. And this threat has been seen to be potent and grave in a time when the constant possibility of lightning war calls for daily vigilance against national disaster, including the wreckage which could be effected by even a small group which seeks to occupy strategic places and which pledges its loyalty to a potential enemy. These harsh realities, sustaining the portion of the Smith Act involved in *Dennis,* equally sustain the portion involved here. For although the charge in *Dennis* was "conspiracy" and the charge here is membership, the danger and the power of Congress to meet it are essentially the same.

2. Petitioner's suggested bases of distinction, with respect to constitutionality, between the "conspiracy"

provisions sustained in *Dennis* and the "membership" clause involved here, have no validity.

(*a*) Like the provisions involved in *Dennis,* the membership clause does not expressly state the element of intent required for conviction. As in *Dennis,* however, it is none the less true "that the statute requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence." 341 U.S. at 499. In *Dennis,* this conclusion followed from the familiar principles that (1) the task of judicial construction is to save, not to destroy, and (2) "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Id.* at 500. These principles apply here. There is no merit in petitioner's claim that the Court should refuse to hold intent to be an element of the crime and thereby create a constitutional difficulty.

(*b*) In his effort to show a constitutional difference between the "conspiracy" problem in *Dennis* and the "membership" problem here, petitioner would have membership in the Communist Party or similar totalitarian organizations viewed as a merely passive status, devoid of any action or concert with others. But we deal here with membership in a rigidly indoctrinated and severely disciplined group dedicated to the violent overthrow of the Government—membership coupled with knowledge of the group's purposes and intent to achieve them. As the Court recognized in *Dennis* (p. 511), "rigidly disciplined members subject to call

when the leaders" find the time has come, comprise the obviously essential sinews of the threat against which the Smith Act is directed. Dealing with such knowing members who aim for the Party's unlawful goals, the membership clause neither covers nor threatens passive dupes or innocents who lack the requisite knowledge and intent.

The rule of *Dennis* does not rest, of course, on some special constitutional principle confined to crimes technically designated as "conspiracies." And the fact is that, at least so far the Constitution is concerned, the combination denounced by the membership clause "partakes of the nature of a criminal conspiracy." *Whitney* v. *California,* 274 U.S. 357, 371-372; see *American Communications Assn.* v. *Douds, supra,* at 432 (Mr. Justice Jackson, concurring). Even the important concurring opinion of Justices Brandeis and Holmes in *Whitney* in no way suggests that the membership clause of the state syndicalism statute there involved ("clear and present danger" considerations being satisfied) presented constitutional difficulties; on the contrary, the implications of the opinion are indicative that those Justices perceived no constitutional obstacle to the enforcement of the membership clause in a proper case.

(*c*) The same reasoning disposes of the claim that the membership clause imposes "guilt by association" and is therefore void. The crime punished is not mere "association." It consists in the individual's personal participation in a combination aimed at forcible revolution with knowledge of this end and intent to achieve it. The liability is personal, not

vicarious. It is for conduct, not mere status. It stands on the same constitutional footing as the conduct held punishable in *Dennis*.

B. *Validity of the clause as applied.*—1. If, as we believe, petitioner fails to show that the membership provision should be held void on its face, he certainly fails to show its invalidity as applied to him. It was proved overwhelmingly that the Communist Party teaches and advocates overthrow of the Government by force and violence, that petitioner knew this, and that he personally intended the accomplishment of that objective. Petitioner was shown to be a Party leader in a significant area, teaching and advocating its doctrines and working for their implementation. The fact that he alone could not overthrow the Government does not immunize him. The same was true of the *Dennis* defendants at the time they were convicted. The Party exists and acts only through its leaders and members who will take action when the time is ripe. Congress could strike at the danger the Party poses in the only way it could be reached—through these leaders and members.

2. Petitioner's specific challenges of the clause as applied have no validity.

(*a*) The record fails to support the claim that the trial court misconstrued *Yates* v. *United States*, 354 U.S. 298, as holding that the Smith Act is directed against advocacy of concrete action irrespective of whether the action is of a violent or a non-violent nature. The court's refusal to give the defense's requested instruction No. 7 does not support petitioner's contention, and the instructions which the

court gave, which petitioner does not criticize, were fully in conformity with those approved by this Court in *Dennis* and *Yates* as to the kind of advocacy with which the Smith Act is concerned.

(*b*) The admission of testimony of former Party members who had no personal knowledge of petitioner or his activities in the Party, on the issue of the nature and character of the Party, did not render the membership clause unconstitutional as applied. The only way to prove what the Party advocated is by the words and teachings of its leading members, and it would be arbitrary to limit the proof on this issue to the words and teachings of the particular leader on trial or of others uttered in his presence. See also the discussion, *infra*, p. 37, relating to the substantially identical issue of the fairness of admitting such testimony.

(*c*) The contention that the indictment failed to charge an essential element of the offense—*active* Party membership—is without merit. The trial court's charge that the jury, to convict, were required to find that petitioner was an active member of the Party was given (at the Government's request) to guard against the possibility that this Court, while accepting the Government's contention that the membership clause is directed only against active Party members, might hold that the determination of this issue is one which should be made by the jury (rather than by the court, in the same manner that the "clear and present danger" determination is made). See, Supplemental Memorandum for the United States on Reargument, Nos. 3 and 4, Oct. Term, 1957. Our position remains

what it was before in this Court in this case, *i.e.*, that the "activity" factor is a controlling constitutional standard, to be applied by the *court*, by which to test whether the membership clause has been validly applied in a particular case. It is no more an "element of the offense," required to be charged in the indictment, than is the "clear and present danger" factor. That the issue was submitted to the jury as a precautionary measure, to forestall the possible need for a third trial, necessitated because of the absence of a charge which might just as well be included in the instructions given at the second, did not have the effect of making this factor an "element of the offense" within the meaning of the rule that the indictment must allege each such element.

## II

Section 4(f) of the Internal Security Act of 1950 does not amend the membership clause of the Smith Act so as to exempt membership, with knowledge and intent, in the Communist Party. It provides that membership in a Communist organization shall not constitute "per se" a violation of any criminal statute. But this does not afford the immunity petitioner claims from prosecution under the Smith Act. He was not indicted or convicted for membership "per se", but for membership coupled with knowledge of the Party's purposes and intent to achieve them.

Failing to find the asserted exemption in the statutory language, petitioner fails equally when he seeks it in what he describes as "logic and legislative history" (Pet. Br. 47). The history only confirms that Con-

gress exempted "membership * * * per se" and nothing more. Indeed, the history shows that Congress was particularly concerned with the Communist Party and in no mood to grant its members any immunity beyond that deemed absolutely necessary for purposes of the Internal Security Act. It fully satisfies the asserted demands of logic to conclude that Congress did only what the language it wrote says—that it exempted only "membership * * * per se." Sections 4(a) and 4(c) of the Internal Security Act—covered, like the Smith Act, by this exemption—are similarly not aimed at membership *per se*. In each instance, the exemption functions perfectly well as an aid to interpretation, making certain that mere membership without more is not to be declared criminal.

## III

The evidence sustains the verdict.

A. The evidence as to the character of the Party's advocacy of violence meets the *Yates* (354 U.S. 298) standard of a call to forcible action at some future time. The proof shows that the Party engaged in systematic, personal indoctrination—not merely in the abstract principles and tenets of Marxism-Leninism, but in the necessity that Party members personally take part in the ultimate violent seizure of power in this country (under the Party's leadership) which is and has been the Party's ultimate aim and objective. An essential aspect of this personal indoctrination—explicit at times, but always implicit at the least—was the urging of all Party members and pupils in the numerous schools and classes and per-

sonal briefing sessions to join forces with all other Party members at the critical time (when the "time was ripe" and the "signal was given") and personally take part in the forcible overthrow of the Government. The record compels the conclusion that it was the intention of the Party leaders and teachers, in indoctrinating Party members and pupils in the classes and schools and individual briefings, to advocate to such members and pupils not merely that it would be a good thing if somebody, someday, overthrew this Government by force and violence, but that they take personal part in a future violent seizure of power, when conditions are right and the summons to immediate action is received from the Party's leaders.

Collectively considered, such evidence, much of which directly involved petitioner, constituted the sort of proof which this Court, in *Yates,* referred to as meeting the evidentiary requirements of the Act, *i.e.,* evidence of "Party classes * * * where there occurred what might be considered to be the systematic teaching and advocacy of illegal action," including the "develop[ment] in the members of the group [of] a readiness to engage at the crucial time, perhaps during war or during attack upon the United States from without, in such activities as sabotage and street fighting, in order to divert and diffuse the resistance of the authorities and if possible to seize local vantage points" (354 U.S. at 331). The Court has held that the Government need not "wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited," but may take preventive action

when it "is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit" (*Dennis*, 341 U.S. at 509). The evidence at bar established that the Communist Party was during the indictment period precisely such a group.

B. The evidence is equally clear and sufficient to prove petitioner's unlawful knowledge and intent. Petitioner acknowledges that he was the Party leader in the Carolinas. This alone goes a long way to prove his knowledge of what the Party was about. In addition, however, there was extensive evidence specifically detailing petitioner's own acts and declarations. These revealed clearly his knowledge and endorsement of the Party's objectives.

The same evidence compelled the jury's determination that petitioner personally intended the realization of these objectives. He led the Party in the Carolinas; he taught its doctrines and recruited members; he worked openly and then underground in the Party's cause. While it may be possibly imaginable that a person could bend all his efforts in this way toward a specific goal without intending to reach it, the jury was certainly free to conclude beyond a reasonable doubt that no such hypothetical divergence between conduct and intent existed here.

## IV

Petitioner received a fair trial.

A. Petitioner's motion attacking the indictment because of the composition of the grand jury was prop-

rly rejected because (1) it came too late and (2) it as insufficient on its merits.

1. Such a motion must be made before the plea is ntered or "within a reasonable time thereafter" when llowed by the trial judge. Failure to present the notion within the prescribed time constitutes a waiver. Rule 12, F.R. Crim. P. Petitioner was given extenions totaling 64 days after his plea in which to preent his numerous pre-trial motions. The motion here n question was not made until more than two weeks fter the expiration of these ample extensions. There as no suggestion of a reason, and there is none now, or the delay. These circumstances fully warranted he decision that the motion must be denied as ntimely.

2. In any event, petitioner's attack on the grand ury which indicted him presents no basis for reversal. Petitioner claims that 28 U.S.C. 1864 was violated in hat the Jury Commission could not have known that here were 300 names of qualified persons in the box when the panel here involved was drawn. But the Deputy Clerk testified that there were in the neighorhood of four hundred to five hundred names in he box and that he was "satisfied" that the number as "more than three hundred"; that, based on 70 ears' residence, he had a "pretty good knowledge" f the people in the county involved, including their background and their present status"; and that it ad been his experience that the jurors drawn for ervice had represented a fair cross-section of the comunity. The testimony further showed that the Clerk ever intentionally or systematically excluded any class

or group and that he sought a wide selection of jurors from all walks of life. Special efforts were made to secure women and Negro jurors. The fact that names of prospective jurors were solicited from community leaders and organizations does not vitiate the Jury Commission's action or the indictment. This was not a case like *Glasser* v. *United States*, 315 U.S. 60, where the defect was solicitation of names from a single organization and a consequently improper weighting of the list. See *Dow* v. *Carnegie-Illinois Steel Corporation*, 224 F. 2d 414, 427 (C.A. 3); *United States* v. *Dennis*, 183 F. 2d 201, 218 (C.A. 2), affirmed on other issues, 341 U.S. 494.

It should be noted, finally, that the method of selection in the district here involved has been changed so as to correct the asserted deficiencies of which petitioner complains. This fact, coupled with the tardiness of the objection and the utter absence of prejudice, makes this a singularly inappropriate case for invoking the supervisory powers of this Court.

B. Petitioner argues that he must be presumed to have been denied a fair trial because Congress, in the Internal Security Act of 1950 and the Communist Control Act of 1954, made findings that the Communist Party aims at violent overthrow of the Government. Because of these legislative findings, it is said, the jury must necessarily be deemed to have been incapable of following the instructions which required that it determine the nature of the Communist Party for itself. But there was no evidence of the bias petitioner would have the Court presume as a matter of law. It was not shown either that the

jurors actually knew of the legislative findings in question or were influenced by them if they did. Petitioner's theory would invalidate every conviction under the Smith Act since 1950 on this ground alone. But the theory, which attacks the verdict on premises inconsistent with the jury system itself, is unacceptable. The suggested possibility of bias could certainly have been explored; it is not a matter to be presumed without proof. Compare *Accardi* v. *Shaughnessy,* 347 U.S. 260, with *Shaughnessy* v. *Accardi,* 349 U.S. 280.

C. The "Jencks" Act's excision procedures (subsection (c) of 18 U.S.C. 3500) are valid, and their application to petitioner's trial did not violate the constitutional prohibition against *ex post facto* legislation.

1. The excision provisions of the "Jencks" Act (directing that, before statements by prosecution witnesses in the Government's possession are turned over to the defense for cross-examination purposes, the court, after *in camera* inspection, excise portions which do not relate to the subject matter of the testimony of the witnesses) are valid.

(*a*) Assuming *arguendo* that the *Jencks* decision, 353 U.S. 657, is based on constitutional grounds, the statutory excision procedure is fully consonant with *Jencks.* Under *Jencks,* only statements which relate to the subject matter of the witness' testimony need be turned over to the defense. There is no more reason for turning over non-relevant portions of a witness' statement which is relevant in part than there is for turning over a statement which is wholly irrelevant to that subject matter. The defendant is

fully protected against the possibility of an erroneous or arbitrary ruling by the trial judge as to the non-germane portions of a statement by the provision of the statute directing that the entire statement be preserved for inspection by the appellate court in the event that the defendant is convicted and appeals. The defense should not be entitled to see a statement of a witness contained in the Government's confidential files in order to determine for itself whether the Government is correct in maintaining that the statement, because it in no way relates to the subject matter of the witness' testimony, should not be seen by the defense.

(*b*) In any event, the *Jencks* decision proceeded, not on constitutional grounds, but on the basis of "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience" and *"[i]n the absence of specific legislation"* (emphasis added) (*Gordon* v. *United States,* 344 U.S. 414, 418, which decision *Jencks* followed and explained).

2. The question of the validity of the "Jencks" Act's definition of "statement" (subsection (e)) does not arise on this record because the *Jencks*-type materials which were in fact turned over to the defense were not limited to statements of the type defined in subsection (e), but (subject to the excision of non-relevant material) included everything which was conceivably demandable under the *Jencks* decision, without regard to the subsection (e) definition.

3. The contention that the application of the "Jencks" Act to petitioner's trial violated the consti-

tutional ban on *ex post facto* legislation because his offense preceded the Act is unavailable because made for the first time in this Court. It is in any event without substance. The excision procedures of the Act—the only provisions of which petitioner can complain—are wholly consonant with *Jencks,* and so did not alter (certainly not in any substantial sense) previously-existing law as interpreted in *Jencks.* Accordingly, no *ex post facto* question arises. But even if it be assumed that the excision provisions of the Act effected a change in previously-existing law, the change was, at most, one relating "to modes of procedure only, in which no one can be said to have a vested right," and which, accordingly, Congress may "regulate at pleasure" (*Hopt* v. *Utah,* 110 U.S. 574, 590).

D. Evidence petitioner attacks as inadmissible was relevant and otherwise competent.

1. It was proper to receive evidence as to the nature and character of the Communist Party which was not directly linked to petitioner. The first element to be proved in a "membership" case is that the group or society was one which taught and advocated the forcible overthrow of the Government. To limit such proof to acts and statements of the particular individual charged (or done or uttered in his presence) is unacceptable because the group's character cannot be established solely by proof of the acts and statements of an individual in isolation.

2. The "three documents * * * relating to the Korean War" (Pet. Br. 65) of which petitioner complains were admissible in the trial judge's discretion

to show that the Party seeks unceasingly to sow the seeds of dissension among the people in an effort to embitter them against their own Government, as part of its long-range strategy of weakening that Government in every way possible, and thus speeding the day when its forcible overthrow will become a practical possibility. Such evidence, which was directly linked to petitioner, tended to show that the Party is a serious *action*-organization which implements its program of ultimate violence with interim plans for preparing the groundwork for the final coup.

3. The evidence that the Party teaches that the Negroes in this country's so-called "Black Belt" should be regarded as an oppressed nation with the right of self-determination was admissible because this teaching was shown to be a basic part of the strategy and tactics of the proletarian revolution which the Party advocates. Petitioner himself was shown to have related the "Black Belt" and "Negro nation" concepts to the Party's program of violent revolution.

## ARGUMENT

### I. THE MEMBERSHIP CLAUSE OF THE SMITH ACT IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED TO THE FACTS OF THIS CASE

We recognize, with the petitioner (Pet. Br. 15), that constitutional issues are to be reached last, not first. However, petitioner begins his argument with the Constitution, and we accept his arrangement of points for the convenience of the Court. We submit that this case is substantially controlled on the constitutional issues by the principles enunciated in *Dennis* v. *United States*, 341 U.S. 494, and reaffirmed

in *Yates* v. *United States*, 354 U.S. 298.[9] Petitioner has failed in his effort to show that, while Congress could punish conspiracy to organize a group which, like the Communist Party of the United States (as established by the evidence in this case, see *infra*, pp. 75–85), advocates the violent overthrow of the American Government in the sense of a call to present or future forcible action, it was powerless to proscribe knowing, purposive, active—and here, high level—membership in such a group from which alone the organization derives its power to work towards the accomplishment of its violent objective.

### A. VALIDITY OF THE CLAUSE ON ITS FACE

1. Reviewed at length in *Dennis*, and long familiar to the Court in any event (see, *e.g.*, Mr. Justice Jackson's opinion in *American Communications Assn.* v. *Douds*, 339 U.S. 382, 422 *et seq.*), the extensive knowledge of totalitarian threats on which Congress has acted scarcely requires lengthy rehearsal here. As the Court knows and everyone knows, it was clear by 1940, when Congress wrote the Smith Act, that the Communist, Nazi, and Fascist movements, armed with

[9] In *Yates*, the convictions were reversed, but on grounds not relevant to the present issue. *Yates* did not weaken the authority of the *Dennis* case but adhered to and reaffirmed the principles underlying that decision (see *Yates*, 354 U.S. at 300, 320–327). *Yates*, in presently pertinent part, held that the kind of advocacy condemned by the Smith Act (as sustained in *Dennis*) is advocacy of violence in the sense of a call to action (now or in the future), as distinguished from advocacy of violence solely as an abstract principle. We argue *infra*, pp. 75–85, that the evidence in this case as to the character of the Communist Party's advocacy of violence fully meets the *Yates* standards.

modern techniques of subversion and infiltration, posed grave threats to democratic governments the world over. To focus only on the Communist Party, which is involved here, Congress had before it voluminous evidence that the Party's members had at least divided loyalties,[10] and that the Party was under the firm, direct control of the Communist International, and, through it, of the Soviet Union.[11] From the testimony of Earl Browder and Benjamin Gitlow and from a great mass of documentary evidence, Congress could reasonably conclude that both the Communist International and the Communist Party of the United States were devoted jointly to a program of establishing socialism through the medium of violent revolution.[12]

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[10] See, for example, the testimony of William Z. Foster, Chairman of the Communist Party of the United States, before the House of Representatives Special Committee To Investigate Communist Activities in the United States, 1930-1931, in which Foster stated that the "more advanced workers" in this country look upon the Soviet Union as "their country" (Hearings, Part I, Volume 4, pp. 384, 385).

The evidence in this case makes it clear that this situation was not limited to the 1920's and 1930's. In 1950, petitioner told the witness Clontz that American Communists looked to the Soviet Union as their "mother country," whose help they would have the benefit of "when the revolution started" (*supra*, pp. 15–16).

[11] Hearings before House Committee on Un-American Activities on H. Res. 282, 76th Congress, 1st sess., pp. 4308–4311, 4432, 4671.

[12] See, *e.g.*, the statement of Representative McCormack of Massachusetts:

"* * * We all know that the Communist movement has as its ultimate objective the overthrow of government by force and violence or by any means, legal or illegal, or a combination of both. That testimony was indisputably produced before the

Events following 1940, both prior to and since the *Dennis* decision, have served to make the Communist threat clearer and more serious and to confirm the judgment on which Congress proceeded in the Smith Act. Immediately following the collapse of Nazi Germany, Soviet troops occupied Poland, Czechoslovakia, Hungary, Bulgaria and Rumania. In each of these countries a new government was established consisting of a coalition of parties, and in each of these countries the Communists were a minority party. In each case the Communists secured control of the Ministry of the Interior—control of the police—and gradually assumed power through the oppressive use of the police and pressure exerted by the Soviet Union.[13]

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special committee of which I was chairman, and came from the lips not of those who gave hearsay testimony, but of the actual records of the Communist Party of the United States, presented to our committee by the executive secretary of the Communist Party and the leader of the Communist Party in the United States, Earl Browder. That was the testimony, the best evidence presented to our committee at that time, that such is the objective of the Communist Party. Therefore, a Communist is one who intends knowingly or willfully to participate in any actions, legal or illegal, or a combination of both, that will bring about the ultimate overthrow of our Government. He is the one we are aiming at, and the Government should have the burden of proving that a person 'knowingly or wilfully' advocates the overthrow of government and is 'knowingly or wilfully' a member of an organization that believes in the ultimate overthrow of our Government." [84 Cong. Rec. 10454]

[13] Poland—15 State Dept. Bull. 422; 16 State Dept. Bull. 299.

Rumania—15 State Dept. Bull. 1057; 17 State Dept. Bull. 38, 329, 995; 18 State Dept. Bull. 216; 20 State Dept. Bull. 450, 692, 755.

Hungary—16 State Dept. Bull. 495, 583, 1215; 17 State Dept. Bull. 392, 411; 20 State Dept. Bull. 450, 556, 692, 697, 755.

Bulgaria—16 State Dept. Bull. 1218; 17 State Dept. Bull.

Recent history demonstrates also that Communist Parties in various countries have provided an extensive network of espionage on behalf of the Soviet Union. Canada discovered the existence of a Soviet espionage ring in 1946,[14] Australia in 1954, when Vladimir Mikhailovich Petrov left the service of the Soviet Union and was granted political asylum in Australia.[15] That a similar network of espionage has existed in the United States and elsewhere seems unquestionable from the testimony of such persons as Whittaker Chambers[16] and Elizabeth Bentley,[17] from the case of Klaus Fuchs in England,[18] and from the *Rosenberg* and *Abel* (No. 263, this Term) espionage trials in this country.

In a word, contemporary history compellingly supports the opinion of Mr. Justice Jackson in *American Communications Assn.* v. *Douds,* 339 U.S. at 425, 429, in which he said:

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429, 481, 531, 702; 19 State Dept. Bull. 447, 710; 20 State Dept. Bull. 450, 556, 692, 755.

Czechoslovakia—18 State Dept. Bull. 304, 446, 536.

[14] *Report of the Canadian Royal Commission,* which was issued after a thorough investigation by a commission of two Canadian Supreme Court Justices.

[15] *Report of the Royal Commission on Espionage* of the Commonweath of Australia, published in 1955.

[16] Hearings before the House Committee on Un-American Activities Regarding Communist Espionage in the United States Government (1948), pp. 1429–1449.

[17] Hearings, *supra* fn. 16, pp. 503–562.

[18] The text of Fuchs' confession is partially reproduced in the *New York Times* for February 11, 1950, p. 2.

1. *The goal of the Communist Party is to seize powers of government by and for a minority rather than to acquire power through the vote of a free electorate.* * * *

* * * * *

3. *Violent and undemocratic means are the calculated and indispensable methods to attain the Communist Party's goal.* It would be incredible naïveté to expect the American branch of this movement to forego the only methods by which a Communist Party has anywhere come into power. In not one of the countries it now dominates was the Communist Party chosen by a free or contestible election; in not one can it be evicted by any election. The international police state has crept over Eastern Europe by deception, coercion, *coup dé'tat,* terrorism and assassination. Not only has it overpowered its critics and opponents; it has usually liquidated them. The American Communist Party has copied the organizational structure and its leaders have been schooled in the same technique and by the same tutors. [Italics in the original.]

The familiar dangers with which Congress, in enacting the Smith Act, concerned itself become greatly magnified in times of grave national crises. The serious threat under which free nations of the world must live today is, through force of necessity, receiving more and more recognition. Since 1955, the Executive Branch of the Government has conducted annual nation-wide Civil Defense exercises to help

insure the country's preparedness in the event of a hostile attack.[19]

The exercises in preparation for possible large-scale nuclear attacks are designed to cope with the problems arising "in a period of 'heightened international tension and deteriorating international relations.' "[20] It requires no lively imagination to com-

[19] In July 1956, following a mock hydrogen bomb attack, the test was carried out on the assumption that planes had dropped bombs and submarines had fired guided missiles on targets consisting of 63 cities, nine air bases, and four Atomic Energy installations. In the New York City area alone it was assumed, for purposes of the test, that five imaginary one-megaton bombs were dropped, inflicting about six million casualties. Ten thousand key operating personnel were required to evacuate Government departments in Washington and travel to 65 relocation centers. *New York Times*, July 20, 1956, p. 1, and July 21, 1956, p. 1. The 1957 exercise assumed a mock attack in which 175 hydrogen bombs were dropped on 162 American cities. The blast of a single twenty-megaton bomb in the New York City area alone, equivalent in destructive power to 20,000,000 tons of TNT, was estimated to have resulted in over six million casualties, without considering the bomb's radioactive fallout propensity. This test similarly entailed a theoretical mass evacuation of thousands of Government employees to relocation sites. *New York Times*, July 13, 1957, pp. 1, 3, July 14, 1957, p. 8, and July 20, 1957, p. 6. The 1958 Operation Alert concentrated on the recovery phase, as opposed to the immediate attack and post-attack phases, of a supposed continental nuclear attack. Again, there was a hypothetical evacuation of thousands of key Government officials and their staffs from Washington to relocation centers for the purpose of resuming governmental functions. *New York Times*, February 20, 1958, p. 4, July 15, 1958, p. 7, and July 17, 1958, p. 13.

[20] *New York Times*, July 7, 1957, p. 9. Current world events of which this Court may well take judicial notice—events associated with such places as Lebanon, Quemoy, and Berlin—reflect, unfortunately, no recent improvement in these international relations or relaxation of such tension.

prehend the danger that would be presented to the national security in a time of disaster by an organization consisting of thousands of highly disciplined, tightly organized, adherents whose doctrines are ideologically attuned to the aggressor nation and who have been located in key positions for revolutionary purposes. And so the danger to which Congress and the Executive have found need to address themselves must be and has been appraised in terms of the lightning speed of modern warfare. Doctrines of infiltration into strategic places and readiness to aid a foreign power's assaults, familiar and central features of the Communist program, cannot be weighed on outmoded assumptions which consider only the threat of the Party by itself in a "normal" world. The threat is not the less real, large, or potentially disastrous for the fact that no one can predict for sure when or if the preparation will eventuate in a direct and violent assault on our security and institutions.

2. Recognizing the solid factual basis on which Congress acted (see, *e.g.*, 341 U.S. at 510–11), this Court, in *Dennis*, concluded (p. 516) "that §§ 2(a)(1), 2(a)(3) and 3 of the Smith Act do not inherently, or as construed or applied in the instant case, violate the First Amendment and other provisions of the Bill of Rights * * *." That conclusion and the premises on which it rests govern this case. To be sure, we are concerned here specifically with the "membership" provision whereas the convictions in *Dennis* were for conspiracy (1) to organize the Communist Party as a group of persons who teach and advocate overthrow

of the Government by force and violence and (2) knowingly and willfully to advocate and teach the duty and necessity of such overthrow. 341 U.S. at 497. And so the present petitioner has undertaken to show that, though Congress could strike at the Communist conspiracy in its inception, it lacks power to reach the forged weapon by punishing those who constitute it when they become and remain members of the Party, knowing its purposes, intending their achievement as speedily as possible, and supplying in this way the force by which such achievement is sought. For this view, petitioner argues (a) that it is "at least doubtful" that a requirement of personal intent may be found in the membership clause though such intent was found to be a requisite in the *Dennis* provisions, and this lack invalidates the statute (Pet. Br. 25, fn. 30);[21] (b) that there is a constitutional difference between the evil of the conspiracy in *Dennis* and the evil of the membership involved here, because the individual as a member lacks the strength and may lack the intent to overthrow the Government (Pet. Br. 20–24); and (c) that the membership clause punishes mere association and imposes "guilt by association" (Pet. Br. 27–28). These arguments, largely ignoring the factual realities which concerned Congress and are revealed in the record here, fail

[21] Petitioner's "doubt" on this question represents a retreat from his position on this point as expressed in his prior brief in this Court. There he argued, affirmatively, that intent "should not be read by implication into [the membership] clause" (Pet. Br., No. 29, Oct. Term, 1956 [No. 3, Oct. Term, 1957], p. 17).

utterly to warrant the proposed constitutional distinction between this case and *Dennis*.

(*a*) *Intent*—As in the portions of the Act considered in *Dennis*, the membership clause does not state expressly the requirement of personal intent. In *Dennis*, following the familiar principle that judicial construction of statutes should save rather than destroy, it was held "that the statute requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence." 341 U.S. at 499. It was recalled there that "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Id.* at 500. That ruling, with its salutary reasons, is squarely apposite here.

Directly contrary to this Court's reminder "that it is the duty of the federal courts to interpret federal legislation in a manner not inconsistent with the demands of the Constitution" (*Dennis*, 341 U.S. at 501), petitioner here contends that, in contrast to *Dennis*, it is "at least doubtful that intent may be read by implication" (Pet. Br. 25, fn. 30) into the membership clause. The effort, we think, has been sufficiently refuted. The principles of constitutional adjudication and criminal jurisprudence which required intent as an element in *Dennis* require it no less here. It is no answer to suggest, in a curious insistence on creating constitutional infirmities, that conspiring to organize the Party and teach and advocate its unlawful objectives (*Dennis*) necessarily en-

tails intent to achieve these objectives, while membership in the Party does not (Pet. Br. 23–24). At most, the suggestion could mean that in certain imaginable cases, not the one here, membership might be proved without showing the requisite intent. It by no means follows that the courts should strain after constitutional difficulty by rejecting the natural conclusion that intent is an element of the crime the statute denounces.

(*b*) *"Membership"*—Pervading petitioner's constitutional arguments is the premise that membership in the organizations against which the Smith Act is directed—with knowledge of their purposes and intent to achieve them—is a merely passive status, connoting neither actions nor declarations, amounting only to a harmless and constitutionally protected form of peaceful assembly. *Dennis* was different, the argument runs, because the crime there was a "conspiracy" and conspiracy—being active and "at work"—stands on a wholly different constitutional footing from "membership." The argument could stand only if "membership" and "conspiracy" were no more than lifeless abstractions and isolated dictionary terms, divorced from their context in the Smith Act and from the evils to which the Act is directed.

The fact is, however, that the "membership" against which this statute is directed is not passive membership in a literary society but (1) active membership in an organization teaching or advocating the Government's violent overthrow, (2) with knowledge of the organization's purpose and (3) a

personal intent to accomplish that purpose. The familiar teachings of recent history, reflected in this case and so many others, show that the membership in question, unlike membership in a club or political party, entails rigidly disciplined adherence to and labors for the organization's unlawful objectives. Thus, in rejecting the constitutional attacks presented in *Dennis,* this Court noted as an essential and integral element of the "highly organized conspiracy" its "rigidly disciplined members subject to call when the leaders * * * felt that the time had come for action * * *." 341 U.S. at 511. Similarly, Mr. Justice Jackson wrote in *American Communications Assn.* v. *Douds,* 339 U.S. 382, under the topic heading, *"Every member of the Communist Party is an agent to execute the Communist program"* (p. 431), that (p. 432):

> Membership in the Communist Party is totally different [from membership in lawful political parties]. The Party is a secret conclave. Members are admitted only upon acceptance as reliable and after indoctrination in its policies, to which the member is fully committed. * * * Moreover, each pledges unconditional obedience to party authority. Adherents are known by secret or code names. They constitute "cells" in the factory, the office, the political society, or the labor union. For any deviation from the party line they are purged and excluded.
>
> Inferences from membership in such an organization are justifiably different from those to be drawn from membership in the usual type of political party. Individuals who assume

such obligations are chargeable, on ordina
conspiracy principles, with responsibility f
and participation in all that makes up t
Party's program.

It was against membership of this now familia
kind that Congress directed the Smith Act. Expres
ing the frequently reiterated understanding of t
Congress, Congressman McCormack said during t
consideration of the bill which became the Act (8
Cong. Rec. 10454):

> A Communist is one who "knowingly o
> willfully" is committed to a movement whic
> has as its objective the ultimate overthrow o
> government by any means legal or illegal, or
> combination of both. We all know that th
> Communist movement has as its ultimate ob
> jective the overthrow of government by forc
> and violence or by any means, legal or illega
> or a combination of both. That testimony wa
> indisputably produced before the special com
> mittee of which I was chairman, and came fro
> the lips not of those who gave hearsay testi
> mony, but of the actual official records of th
> Communist Party of the United States, pre
> sented to our committee by the executive sec
> retary of the Communist Party and the leade
> of the Communist Party in the United State
> Earl Browder. That was the testimony, th
> best evidence presented to our committee at tha
> time, that such is the objective of the Com
> munist Party. * * *

Against the background of the realities with whic
Congress was concerned in the Smith Act there is n
meaningful place for the suggestion that the member

ship clause must be held invalid on its face because, read only as a bare collocation of words without a context, it *could* reach the "entirely passive" member who attends no Party meetings and has no "Party contacts or activities" of any kind (Pet. Br. 24–25). Certainly, there has been no effort to prosecute such an individual in the case before the Court or in any other. This is clearly not such a case, as the jury necessarily found in arriving at its verdict.[22] And the hypothetical possibility is—to paraphrase *Dennis*—"particularly nonpersuasive when presented by [petitioner], who, the jury found, intended to overthrow the Government as speedily as circumstances would permit" (at 515).[23] In any event, the possibility is in fact only imaginary when it is considered in the light of what Congress justifiably believed and sought to guard against when it wrote the Smith Act. Sensibly read, the language negatives any basis for fearing that the innocent or the duped may be ensnared.[24] It is

[22] See *infra*, pp. 64–68.

[23] The quoted language was used in rejecting a claim that the Smith Act, as construed, was objectionably vague.

[24] The situation is thus very different from that which existed in *DeJonge* v. *Oregon*, 299 U.S. 353, where the indictment was brought under an Oregon statute making it a crime "to preside at or conduct or assist in conducting any assemblage of persons, or any organization, or any society, or any group, which teaches or advocates the doctrine of criminal syndicalism." Since it was held that the statute was so broad in its scope that it could reach individuals who were not themselves members of the Communist Party or familiar with its purposes, the Court found the statute unconstitutional on its face with the observation (p. 362) that "peaceful assembly for lawful discussion cannot be made a crime."

Similarly unhelpful to petitioner is *Herndon* v. *Lowry*, 301

directed only at those who, with full knowledge of the organization's unlawful purposes, lend it their "aid and encouragement" and add to its strength by their active membership, thereby making themselves "party to the unlawful enterprise in which it is engaged." *Frankfeld* v. *United States*, 198 F. 2d 679, 684 (C.A. 4), certiorari denied, 344 U.S. 922. Finally, if a prosecution should be brought against a passive member who does not fall into this category, the courts could strike down the conviction as constitutionally invalid—just as they would strike down a conviction if not satisfied of the presence of a "clear and present danger." See *infra*, pp. 64–68.

It seems clear, then, that the applicability of the *Dennis* ruling is not to be escaped by the effort to assign to the "conspiracy" there a constitutional significance which disappears wholly from the tightly interrelated "membership" now before the Court. We submit, on the contrary, that if, as *Dennis* establishes, Congress can proscribe the teaching and advocacy of violent overthrow of the Government and can proscribe the organizing of a group for such purpose, it can equally prohibit active membership in such a group—particularly high-level member-

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U.S. 242, where, reversing a state conviction for an attempt to incite to insurrection by violence, decision went "on the ground that the Fourteenth Amendment prohibited conviction where on the evidence a jury could not reasonably infer that the defendant had violated the statute the State sought to apply." *Dennis*, at 538 (Frankfurter, J., concurring). There, though the defendant had solicited members for the Communist Party, the defect was a lack of proof "that he had urged or even approved those of the Party's aims which were unlawful." *Ibid.*

ship—coupled with knowledge of the purpose and a specific intent to accomplish it as speedily as possible. Indeed, insofar as the problem of conspiracy has a role in sustaining the power of Congress to act, it is scarcely less present here than it was in *Dennis*, where the specific term "conspiracy" described the crime. For, as Mr. Justice Jackson said in the opinion quoted earlier, "ordinary conspiracy principles" are plainly relevant to membership in an organization where membership entails such tightly disciplined, quasi-military, deeply conspirational activities as those of the organizations against which the Smith Act is directed. *American Communications Assn.* v. *Douds, supra,* at 432. Such membership obviously partakes of the concert-of-action, combination, and acting-together which characterize conspiracy. As observed by the court below (R. 459):

> [M]embership in an organization with knowledge of its purposes and an intent to make them effective is a joint rather than an individual undertaking which gathers its strength from an association or group of individuals inspired by a common purpose. * * * [H]e who joins [such a group] with open eyes becomes a party to all that he sees.

These views, rendered more compelling by the experience of the intervening years, merely echo what this Court said thirty years ago in the comparable, though measurably less acute, circumstances of *Whitney* v. *California*, 274 U.S. 357, 371–372:

> The essence of the offense denounced by the Act is the combining with others in an association for the accomplishment of the desired

> ends through the advocacy and use of criminal and unlawful methods. It partakes of the nature of a criminal conspiracy. * * * That such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals, is clear.

To be sure, what the Court said in *Whitney*—and has never repudiated—must be read with the weighty concurring opinion of Justice Brandeis, joined by Justice Holmes. But at this juncture the significant fact about that opinion is precisely that it was a concurrence, joining in affirmance of the conviction. The state statute there punished membership, as does the provision here, and the information charged, in the conjunctive, the organizing of, and knowing membership in, the organization there involved. Justice Brandeis' opinion was concerned with "clear and present danger" considerations. After pointing out that Miss Whitney had failed to raise the clear and present danger issue at her trial, Justice Brandeis said that if she had done so, and if the issue had been resolved in her favor by a finding on the part of the court or jury that the requisite danger did not exist (the Justice indicated that a finding that such danger did exist might well have been supportable), he would have voted to reverse; it was only because that issue had not been raised that he voted to affirm, and so concurred in the result. But the significant point about the concurring opinion for present purposes is that it did not distinguish between the organizing and membership clauses of the information, or in any way

indicate that violation of the membership provision of the statute would not have been constitutionally punishable provided the clear and present danger test was met. There is nothing in the opinion to suggest that a statute denouncing "membership" as a crime is, as petitioner urges, void on its face; on the contrary, the implications of the opinion are quite to the contrary.

Thus, both opinions in *Whitney* help to refute the claim that, in the teeth of *Dennis,* upholding the closely related conspiracy provision, the membership clause of the Smith Act may be held void on its face. In itself, the particular word "conspiracy" is obviously not the key to the constitutional problem. Insofar as there is importance in the nature of the public dangers to which "conspiracy" may be a shorthand reference in the Smith Act context, the same factual judgments by Congress which sustain the conspiracy provision of the Act defeat the contention that the companion membership clause is void.

(*c*) *"Guilt by association"*—The considerations just discussed dispose equally of the claim that the membership provision is invalid because it creates a crime involving only "guilt by association." The defendant convicted under this provision is, in the words of petitioner's brief (p. 27), "held criminally liable only for his own conduct, or for the conduct of others in [a] form of concert or combination which is recognized by our law as warranting holding an individual participant responsible for the acts of other participants." There is no force in petitioner's subsequent observation (*ibid.*) that " 'Membership' is not

such a recognized combination." For the fact is that the kind of membership at which the Smith Act strikes—active, knowing, purposive—is precisely such a combination, long recognized by Congress and by all the world. And the only question is whether, having recognized it, Congress was powerless to act against it. The *Dennis* case answers that question, and the square applicability of the answer here is not obscured by the facile claim that the membership in issue amounts only to "guilt by association." "Guilt by association" connotes personal innocence and unawareness. That term cannot be used to describe active membership in a group such as the Communist Party, with full knowledge of its unlawful aims and the personal intent to bring them about. See also *infra*, pp. 64–68, 85–88.

B. VALIDITY OF THE STATUTE AS APPLIED IN THIS CASE

1. If, as we have urged, the membership provision is valid on its face, there can be little doubt that it could be and was constitutionally applied in this case. Viewing the indictment alone, and building upon his factually groundless premise that the membership in question is a merely passive "status," the petitioner says (Pet. Br. 24) that "[f]or all that appears from the indictment * * *, he never met another member of the Communist Party, much less discussed or plotted the violent overthrow of our Government with any other members." It might as well be said that a man who spent his career in the Navy never met another sailor. The answer is, of course, that the in-

dictment does not charge "membership" as a bare, general abstraction applicable both to a garden club and to Murder, Incorporated, but a particular membership—membership in "a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit" (R. A2), and membership coupled with full knowledge of the group's aims and intent to accomplish them "as speedily as circumstances would permit" (*ibid.*). The indictment describes considerably more than a mere "status (membership) and state of mind" (Pet. Br. 24). It charges, as we have shown, that petitioner joined himself with an unlawful combination which Congress could validly proscribe as a whole and in its constituent parts.

Turning from the indictment to the proof, the validity of the statute's application becomes even clearer. The evidence, reviewed elsewhere (*supra,* pp. 6–23; *infra,* pp. 75–88, 121–139), demonstrated clearly that the Communist Party—wedded to doctrines of violent revolution, tightly controlling and indoctrinating its members—teaches and advocates the forceful overthrow of the Government. It was proved beyond doubt that petitioner fully understood, supported, and intended the achievement of the Party's ends; that he was no mere innocent or trivial underling, but a *leader* in the organization with control over a significant area; and that he engaged aggressively in the Party activities his active membership and leadership entailed. The proof fully sustained both the jury's verdict and

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the trial judge's finding of the existence of "clear and present danger."

The considerations which answered the clear-and-present-danger argument in *Dennis* apply here as well. Petitioner is, of course, correct when he states (Pet. Br. 22–23) that neither he nor any other individual has power to overthrow the Government by force. But it was no less clear in *Dennis* that the Party as a whole, with those who conspired to organize it—without the events they anticipated—lacked such power currently or for at least the near future. (But cf. pp. 41–45, *supra*, recalling the experience of countries like Poland and Czechoslovakia and the nature of the Party's infiltration program which, at least today and for the foreseeable future, makes the danger presented by the Party a threat capable of calamitous realization). *Dennis* teaches, however, that Congress may act against "an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists * * *." 341 U.S. at 509. The power which entitled Congress to act against a conspiracy to organize the Party is at least equally available to strike against the Party-in-being in the only way the Party can function and be reached—through its members. The fact that each member in isolation, even a leading member, may seem insignificant cannot bar Congress from dealing with the "ingredients of the reaction * * *." *Dennis*, at 511. Just as the Nation's commerce may be protected by dealing with individual instances which taken alone lack consequence (*e.g.*, *Polish National*

*Alliance* v. *National Labor Relations Board*, 322 U.S. 643, 647–648), the Communist Party's threat to the national security may be reached through the members who comprise it, at least where those members have the active purpose to help the Party achieve its unlawful objective. Such members will either be the leaders who undertake to launch violent action when "the circumstances permit", or the indoctrinated followers who will readily and enthusiastically answer the call (*Dennis*, at 509, 511). Petitioner was the Party leader in the Carolinas, a "rigidly disciplined" member of the conspiratorial group, and the one most likely to plan and carry out the Party's unlawful objective in that area.

2. Petitioner argues, however, that, as applied in this case, the membership clause is unconstitutional because, allegedly, (a) the trial court erroneously construed the *Yates* holding (354 U.S. 298, 312, 320) as to the nature of the advocacy, or "incitement," properly punishable under the Smith Act (Pet. Br. 33–39), (b) the admission, as part of the Government's proof of the nature and character of the Communist Party, of testimony of persons (former Party members) who did not have any knowledge of petitioner or of his Party activities rendered the "metes and bounds of the Smith Act, in terms of guilt or innocence," so "vague and far-reaching" as to be violative of due process as well as the First Amendment (Pet. Br. 39–41), and (c) the indictment failed to charge an essential element of the offense (Pet. Br. 41–44). We submit that none of these contentions has merit.

(*a*) After adverting to the fact that under the standards of proof laid down by this Court in the *Yates* case, 354 U.S. 298, "advocacy of forcible overthrow is punishable under the Smith Act only (354 U.S. at 312, 320) if the advocacy is of such a nature as to 'incite' persons to take 'concrete action for the forcible overthrow of government'" (Pet. Br. 33), petitioner argues (Pet. Br. 33–39) that "the prosecution and the court put an erroneous construction on this requirement" (Pet. Br. 33). "The prosecution saw only the words 'concrete action,'" says petitioner, "and ignored or overlooked the qualifying phrase 'for the forcible overthrow of government.' As a result, the prosecution took the position that proof of Communist Party incitement to action of *any kind* would be relevant to the case and sufficient to meet the standard of proof prescribed in the *Yates* case" (Pet. Br. 33–34; petitioner's emphasis). That the court shared this misconception, the argument concludes, is evidenced by the fact that it refused to give a defense-requested instruction (No. 7, R. A33–A34) that "the 'action for the forcible overthrow of the government' referred to in the *Yates* case does not include constitutionally protected activities such as speaking, publishing, or writing letters to public officials, unless those means of public persuasion are used to advocate forcible overthrow of the government" and that "the defendant could not be found guilty 'if the activities incited by the Communist Party include only such means of public persuasion as are used to voice opinions on public issues of foreign and domestic policy, no matter how unpopular or odious to the majority of

American citizens those opinions may be'" (Pet. Br. 35-36).

We submit that, while one of the prosecuting attorneys at the trial (there were four) did, at one point in the trial proceedings, use language (R. A9, quoted at Pet. Br. 34 and *infra*, p. 62) which suggests that he may have misinterpreted the nature of the incitement-to-action type of advocacy which this Court, in *Yates*, held to be the sort of language prohibited by the Smith Act, the record is clear that the court entertained no such misconception and—what is most important—did not by its instructions and refusals to instruct, as petitioner maintains, permit the jury to base a finding of guilt on the basis of any such erroneous conception.

The Government attorney's remarks were made extemporaneously in the course of oral colloquy with the court as to the admissibility of a certain issue of a newspaper, *The Textile Workers' Voice* (G. Ex. 62 for identification), which the Communist Party published in North Carolina and copies of which were furnished by petitioner to witness Clontz (R. A7; Tr. 1132-1133). One of the articles in this paper, entitled *The Atlantic Pact*, was a vituperative attack on the "treaty called The Atlantic Pact," including a charge that, whereas "the Taft-Hartley Act * * * uses police, soldiers and courts against American workers," the "Atlantic Pact wants to use atom bombs against the workers of the whole world" (R. A8-A9). The article concluded with an appeal to readers to write to their Senators and "tell them to vote this war pact down" (R. A9). On objection and motion

to strike by defense counsel, the court asked government counsel, "How is that relevant * * *?" (*ibid.*). Government counsel made the following reply, which is the basis of petitioner's contention (*ibid.*):

> If Your Honor please, * * * it is directly linked to the defendant and it carries with it what we call his language which incites to action. It is urging action either now or in the future. "Write to your Senators." It expresses the desire of the Communist Party, and we think the language itself is inciting to action.

The court's response to the foregoing, which petitioner neglects to mention, was as follows (Tr. 1137-1138):

> I think that it is connected with the defendant all right, *but I do not see that it has any relevancy to the subject matter of the case.*
>
> *I think the motion should be sustained.* [Emphasis added.][25]

There is thus no basis for petitioner's contention that the trial court erroneously construed the *Yates* decision with respect to the meaning of language which "incites to action." The court's refusal to give the defense's requested instruction No. 7 (*supra*, pp. 60–61), which petitioner cites as proof that the court

[25] Later in the proceedings, after intervening colloquy, the court took under advisement the admissibility of the particular exhibit in question and some six others (R. A13–A14; Tr. 1676–1677, 1705). The court thereafter excluded four of the exhibits, including that which gave rise to the quoted colloquy, and admitted the others (R. A18). The admissibility of the latter is treated *infra*, at pp. 116–119.

misconstrued *Yates* on this point, in no way indicates what petitioner suggests. This instruction was refused because, as the court remarked, "it in effect selects certain portions of the evidence" (Tr. 1987)—contrary to the court's determination not to discuss specific aspects of the evidence in its charge. But the thorough and careful instructions which were given were fully in conformity with those approved by this Court in *Dennis* (341 U.S. at 511–512) and more recently in *Yates* (354 U.S. at 326) as to the kind of advocacy at which the Smith Act is directed, and, in effect, included the substance of the defense's requested instruction No. 7 (R. A37–A40).[36] Accordingly, petitioner's argument on this point cannot be accepted.

(*b*) Petitioner also urges that the admission of testimony of former Party members who had no personal knowledge of petitioner or his activities in the Party, on the issue of the nature and character of the Party, rendered the membership clause unconstitutional as applied. This contention is answered in substance at pp. 113–116, *infra*, where we reply to the argument that the admission of such testimony deprived petitioner of a fair trial. In summary, our point is that (a) the only way to prove what the Party advocated is by the words and teachings of its leading members; (b) the Party is a tightly-knit, well-disciplined group, not a loose, amorphous society; (c) petitioner was a Party leader, active and knowledgable; and (d) he was shown to have the necessary un-

[36] Petitioner, significantly, makes no complaint concerning the instructions which were given.

lawful intent. In these circumstances, it was app
priate, fair, and valid to admit the testimony of
former Party members.

(c) The contention that the indictment failed
charge an essential element of the offense is likew
without merit. The argument is that the Gove
ment, in order to save the membership clause fr
being declared void on its face by this Court, has
jected a new element into the offense defined by t
clause—an element specified neither in the langu
of the statute nor in the indictment—and prevai
upon the trial court to require the jury, in order
convict, to find this element to be present in this ca
it follows, says petitioner, that he has been convic
of an offense with which he has never been prope
charged (Pet. Br. 41–44).

It is true that the trial court, at the Governmen
request, charged the jury that they were required
find that petitioner's Party membership (in additi
to being coupled with the requisite knowledge a
intent) was an "active" membership (defined as
entailing the devotion of "all, or a substantial part,
[one's] time and efforts to the Party," as dist
guished from a mere "nominal, passive, inactive,
purely technical membership" (R. A41)). It is a
true that this so-called "activity" factor is not m
tioned explicitly in the statute or the indictment. B
it does not at all follow that petitioner has been c
victed of an offense with which he has not prope
been charged.

Following this Court's restoration of the prior
peal in this case (and the *Lightfoot* case) to

docket for reargument (353 U.S. 979), and before the Court's reversal and remand of those cases because of the production-of-documents errors (*Scales* v. *United States*, 355 U.S. 1; *Lightfoot* v. *United States*, 355 U.S. 2), the Government filed a supplemental memorandum in this Court the purpose of which was "(1) to clarify some aspects of our argument at the last term on the constitutional issue, and (2) without in any wise abandoning our position that the membership clause has been properly and validly applied in these cases, to present certain suggestions as to the disposition of the cases should that position not be wholly accepted by the Court" (Supplemental Memorandum for the United States on Reargument, Nos. 3 and 4, Oct. Term, 1957, pp. 2–3). We pointed out that, in defending the validity of the membership clause on its face, and as applied in those cases, we had urged that the clause does not apply to "a merely passive status," but solely to "active membership" in a society of the type defined in the Act, with the requisite knowledge and intent (*id.*, p. 3). We further pointed out that, since neither jury had been specifically instructed that a finding of such *active* membership was requisite to conviction, there was implicit in our argument the idea that the determination that the membership be of an active quality was not required to be made by the jury, but could be made by the trial court—in the same manner that a finding of the existence of a "clear and present danger" is one which is properly made by the court (*ibid.*). We emphasized that we were *not* suggesting that the "activity" factor was to be considered "an element of

the crime established by the Smith Act, to be proved in addition to" membership, knowledge, and intent, but, rather, that it was a "controlling constitutional standard by which to test whether the membership clause of the Smith Act has been validly applied in a particular case" (*id.*, pp. 3–4)." In recognition, however, of the possibility that the Court, while accepting our position that only *active* membership is punishable under the Act, might be of the view that the determination of whether the membership is or is not of an active quality is for the jury to decide, we suggested that it would be desirable for this Court to give guidance to the trial courts as to the contents of a proper instruction (*id.*, p. 5) and set forth what

" As we said in our Supplemental Memorandum, statutorily the crime is fully proved by sufficient evidence of membership, knowledge, and intent, but the "activity" test then determines whether the conviction can be allowed to stand under the Constitution. Just as the finding of "clear and present danger" is not an integral element of the various offenses under the Smith Act, but an external constitutional limitation on the validity of convictions under the Act which are otherwise proper, so the factor of "activity" plays the same limiting role with respect to the membership clause.

For this reason—that the "activity" factor is not an element of the offense but an overriding constitutional test—the determination of "activity" is not for the jury but for the court, on the basis of its own evaluation of all the evidence adduced by both sides. With respect to this determination, as well as for the "clear and present danger" finding, "[t]he question * * * is whether the statute which the legislature has enacted may be constitutionally applied. In other words, the Court must examine judicially the application of the statute to the particular situation, to ascertain if the Constitution prohibits the conviction. * * * Bearing, as it does, the marks of a 'question of law,' the issue is properly one for the judge to decide" (*Dennis v. United States*, 341 U.S. at 514–515).

we thought would be an appropriate charge on the point (*id.*, pp. 6–7).

As previously noted, the Court thereafter, without hearing reargument, remanded the cases to their respective Courts of Appeals solely on account of the production errors. Although the Court, in remanding, was silent with respect to the subject matter of our Supplemental Memorandum, the trial court, at the re-trial of the instant case, incorporated (at the Government's request) the substance of our suggested charge in its instructions to the jury (R. A41). The reason for the Government's request and for the court's acquiescence is thus clear: to guard against the *possibility* that this Court might hold such a charge necessary to a valid conviction under the membership clause. We have never thought the inclusion of such a charge was *necessary*, and do not now.[22] Our request was purely a precautionary measure, designed to forestall the possible need for a third trial, necessitated because of the absence of a charge which might just as well be included in the instructions given at the second; our primary position remains what it was before—that the "activity" factor is a controlling constitutional standard, to be applied by the *court*, by which to test whether the membership clause has been validly applied in a particular case.

In the light of these circumstances, we submit that

[22] Unlike petitioner. (see Pet. Br. 42, fn. 44), we fail to see any inconsistency between the Government's action at the trial in requesting the charge on "activity" and its argument in the Court of Appeals that the instruction was "unnecessary," and, in the light of the circumstances as outlined in the text, submit that there is none.

there is no substance to petitioner's claim that the Government and the trial court have injected into the membership clause a new "element of the offense," which Congress has failed to define. And by the same token there is no merit to the argument that petitioner has been unconstitutionally convicted of an offense with which he has never been charged.

## II. SECTION 4(F) OF THE INTERNAL SECURITY ACT OF 1950 DOES NOT AMEND THE MEMBERSHIP CLAUSE OF THE SMITH ACT SO AS TO EXEMPT MEMBERSHIP, WITH KNOWLEDGE AND INTENT, IN THE COMMUNIST PARTY

A. Section 4(f) of the Internal Security Act of 1950 (Pet. Br. App. 3a–4a) provides that "[n]either the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute." Petitioner argues that this provision limits the scope of the Smith Act so that the membership clause no longer applies to membership in any Communist organization (Pet. Br. 44-50). The argument is plainly refuted by the statutory terms; Section 4(f) refers only to membership "per se" whereas the Smith Act punishes membership, not "per se," but coupled with knowledge and intent. And petitioner's effort to find in legislative history the unlikely repealer the language of 4(f) does not effect is demonstrably unsound.

Perhaps the use of the term "membership clause" to describe the pertinent provision of the Smith Act is the primary source of plausibility in petitioner's argument, since it carries the implication that mere "membership" as such is proscribed. The language

of the Act dispels this misconception, declaring explicitly that it is limited to anyone who "becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, *knowing the purposes thereof*" (emphasis added). In addition, as we have shown (*supra*, pp. 47–48), the membership provision of the Smith Act requires for conviction an intent to achieve the group's unlawful purposes as speedily as circumstances permit. Unless those requirements of knowledge and intent are ignored, or the reference in the Security Act to membership "per se" is misread to mean membership plus knowledge plus intent, the application of the Smith Act to the offense here charged was not affected.

Petitioner suggests no reason for ignoring the words "knowing the purposes thereof" in the Smith Act. In this case, the court below on the former appeal not only noted their presence, but specifically decided that they added the element of knowledge as an essential part of the offense (*Scales* v. *United States*, 227 F. 2d 581, 589), and the differently constituted Court of Appeals on the instant appeal adhered to and reaffirmed these views (R. 460–461). This interpretation has been approved by the Seventh Circuit in *United States* v. *Lightfoot*, 228 F. 2d 861, 871, reversed on other grounds, 355 U.S. 2, and by the Second Circuit in *United States* v. *Noto*, 262 F. 2d 501, 508, pending on petition for a writ of certiorari, No. 564, Misc., this Term. See also *Dunne* v. *United States*, 138 F. 2d 137, 143 (C.A. 8), certiorari denied, 320 U.S. 790. When this critical difference in express terminology is coupled with the *Dennis* principle

(*supra*, pp. 47–48) requiring the further element of i tent for conviction under the Smith Act, no room left for finding in the membership "per se" exempti under the Internal Security Act an absolution fo those Communist Party members who have the requ site knowledge and intent.

What petitioner's argument amounts to is th linguistically untenable claim that when Congre used the language "membership * * * per se" i meant "membership plus knowledge and intent * * per se". This argument is inherently improbable i view of the use of the language "per se", which mus have been inserted to refer to naked membership Unless the very word "membership" includes within itself the concepts of knowledge and intent, peti tioner's argument is basically inconsistent with th Act. This Court has recently recognized that Congre can legislate and has legislated with respect to mem bership without either knowledge of the aims of a organization or intent to carry them out. *Galvan v. Press*, 347 U.S. 522, 526–528. In that case the Court held an alien deportable on the basis of membership alone without proof of knowledge of the aims of the organization. Moreover, petitioner himself agrees—in connection with his discussion of the constitutional issues—that "membership" can and does exist without knowledge of the organization's aims and without any intent to foster or achieve them.

B. Since the petitioner can find little comfort in the language of the two Acts, he seeks support in what he terms "logic and legislative history" (Pet. Br. 47). Neither the precursor bill (H.R. 5832, 80th

Cong., 2d sess.) nor the initial versions of the bills (H.R. 9490, S. 2311) in the 81st Congress, which eventually passed as the Internal Security Act, contained anything comparable to Section 4(f). Apprehension then arose that the registration provisions (finally enacted as Sections 7 and 8, 50 U.S.C. 786, 787) might be held unconstitutional under the Fifth Amendment on the ground that other provisions of the Act (Sections 2 and 4(a)) might be construed to make membership in the Communist Party in itself illegal, so that all of the proof necessary for conviction could be obtained from the registration provisions.[28] When the Senate Judiciary Committee sought to meet this objection by inserting in S. 4037 (81st Cong., 2d sess.) a provision like present Section 4(f), but applicable only to Sections 4(a) and 4(c) of the bill, certain Senators raised on the floor the objection that under this provision the registration provisions might still be claimed to incriminate members because of the Smith Act.[29] In response to this objection, the final version of the bill as it came from conference contained the present language of Section 4(f); there can be no doubt that it was drafted with the Smith Act in mind.

This is a long way from an intention to modify the

[28] These doubts were expressed in a letter from the late John W. Davis to Senator McCarran, dated February 10, 1950 (96 Cong. Rec. 15258), a report from Attorney General Clark (96 Cong. Rec. 14597), and a statement by Senator Langer (96 Cong. Rec. 15204).

[29] Senator Kefauver (96 Cong. Rec. 15198), Senator Humphrey (96 Cong. Rec. 14479), and Senator Lehman (96 Cong. Rec. 14190) raised this point.

Smith Act so that membership in the Communist Party, plus knowledge of its aims, plus an intention to promote such aims, should no longer be covered. The most that can be said is that Congress intended the Smith Act to be read with Section 4(f) as an aid to interpretation so that it would not be held applicable to membership alone, much as this Court read the Sherman Act and the Norris-LaGuardia Act together in *United States* v. *Hutcheson*, 312 U.S. 219, to determine the extent of the exemption from criminal sanctions granted to unions. There is no adequate ground for the improbable conclusion that the Congress which passed the Internal Security Act meant thereafter to exempt Communists, objects of particular concern, from the membership clause of the Smith Act. If that clause did not cover Communists, it would be unlikely to cover anybody.

Elsewhere in the Internal Security Act, Congress gave further evidence that Section 4(f) was to mean only what it said, and not to provide the immunity petitioner seeks from it. Plainly, the extensive findings in Section 2 of the Act (50 U.S.C. 781) as to the menace of the Communist Party hardly comport with petitioner's effort to expand the immunity under Section 4(f) beyond what its terms require. And, to make sure, Congress added in Section 17 (50 U.S.C. 796):

> The foregoing provisions of this title shall be construed as being in addition to and not in modification of existing criminal statutes.

As to the "logic" of petitioner's position, it does not follow, as he suggests, that merely because no

criminal law at the time of the Internal Security Act forbade membership *per se*, one must assume the repeal of the nearest thing, *i.e.*, membership plus knowledge plus intention. True, since the membership clause does not apply to membership *per se*, but only to membership when coupled with these subjective states (knowledge plus intent), it was not, strictly speaking, necessary for Congress to include in Section 4(f) the phrase "or of any other criminal statute" in order to insure that the membership clause would not be deemed to apply to such naked membership. But petitioner's argument that this proves that by those words Congress must have intended to effect "immunity from prosecution [under the membership clause]" (Pet. Br. 48) for Communist Party members who *otherwise* come within the purview of that clause—*i.e.*, persons who, in addition to being members, have the requisite knowledge and intent—is based on the most mechanical "logic" indeed. It imputes to Congress a legislative intent which there is not the slightest evidence to suggest that Congress had. The obvious method of accomplishing what petitioner argues Congress meant to do would have been to amend the membership clause directly and unambiguously. What (we submit) Congress meant to do in inserting the disputed language into Section 4(f)—doubtless out of an abundance of caution in its concern to safeguard the constitutionality of the registration provisions and thus ensure their enforceability—was to eliminate any conceivable doubt that the membership clause was not to be deemed applicable

to *mere* membership in a Communist organization, without more.

Mere membership is a far different concept, as we have stressed under Point I, *supra*, from membership plus knowledge plus intent. There is no reason to believe that Congress, in enacting Section 4(f), desired to treat them on a par. As suggested above, it is far more logical to assume that Congress wished to treat them differently and intended Section 4(f) as an aid to interpretation not only of Sections 4(a) and 4(c) of the Internal Security Act, which also do not on their face outlaw mere membership, but also of the membership clause of the Smith Act.[21]

In sum, the language of the various statutes, their legislative history, and logic all lead to the conclusion that membership in the Communist Party, *standing by itself*, should not be made criminal. This leaves unaffected the present case, where the statutory prohibition, the indictment, and the evidence all encompass not only membership in the Communist Party but knowledge of its unlawful aims and an intent to promote those aims.

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[21] Similarly, the decision of Congress not to adopt Senator Humphrey's suggestion in 1954 to proscribe membership in the Communist Party with knowledge of its purposes, on the ground that it would fortify the claims to self-incrimination under the registration provisions (see Pet. Br. 49–50), adds nothing to petitioner's previous argument. It merely shows that Congress was as concerned in 1954 as it was in 1950 to take no action which, under even the most liberal interpretation, would endanger the enforceability of those provisions.

## III. THE EVIDENCE FULLY SUPPORTS THE VERDICT

### A. THE EVIDENCE AS TO THE CHARACTER OF THE PARTY'S ADVOCACY OF VIOLENCE MEETS THE *YATES* STANDARD OF A CALL TO FORCIBLE ACTION AT SOME FUTURE TIME

In *Yates* v. *United States*, 354 U.S. 298, this Court construed the Smith Act's teaching and advocacy clause as referring to the teaching and advocacy of violent governmental overthrow in the sense of a call to forcible action to that end (pp. 312–333). The clause makes illegal "advocacy directed at promoting unlawful action", the Court held, as distinguished from "mere doctrinal justification of forcible overthrow" or the advocacy of force "as an abstract principle" (pp. 318, 321).

In thus distinguishing between "advocacy of abstract doctrine" and "advocacy of action" (354 U.S. at 320), however, the Court was careful to point out that the "action" advocated, to come within the Act's proscription, was not required to be present action, or immediately impending action, or even action to be taken at a fixed or foreseeable future time. Referring to the fact that what "was condemned in *Dennis*" was "*indoctrination* preparatory to action", and adverting to "the holding in *Dennis* that advocacy of violent action to be taken at some future time was enough", the Court epitomized its ruling as relating to "advocacy or teaching in the sense of a call to forcible action *at some future time*" (354 U.S. at 320, 322, 329; emphasis added). When this time will occur is, necessarily, not calculable in advance. For, as the Court noted, the summons to present, or imminent, action will not come until "the time [is] ripe" (354

U.S. at 332). And that will occur only when the Party's leaders "fe[el] that the time ha[s] come for action" (*Dennis*, 341 U.S. at 511)—at the historic coincidence of the so-called "objective" and "subjective" conditions of which the witnesses in this case spoke (*infra*, pp. 123–124, 130, 132). Both *Dennis* and *Yates*, in short, make clear that the particular time in the future when the action advocated is to take place is unimportant so far as enforcement of the advocacy clause of the Smith Act is concerned; what is essential is that it be in fact *action* that is advocated, *i.e.*, forcible action to be taken by the persons to whom the advocacy is addressed, whenever the signal for such action is received from the Party leaders.[22]

It remains, then, to consider whether the evidence adduced at the trial below as to the character of the Party's advocacy during the pertinent years (1946–54) meets the evidentiary standard of "advocacy of

[22] Obviously, this signal will not be given until the Party leaders think that the venture's prospects of success are good. As Party leader Doxey Wilkerson told witness Clontz, the Party wants a successful revolution, not "martyrs" (*infra*, p. 135). It is equally evident that if the signal is long delayed—if the "objective" and "subjective" conditions for successful violent revolution in a given country or area of the world are long in coming to pass—not all of those who have been indoctrinated and readied for action over the years will be present to participate in the actual uprising or "*putsch*" (*Dennis*, 341 U.S. at 509). It is clear, however, both from *Dennis* and *Yates* that neither of these imponderables is a bar to the present enforcement of the Smith Act's prohibitions against present advocacy of future violence.

action" thus articulated in the *Yates* case.[33] We submit that it does. That evidence has been summarized in detail in Appendix A, *infra*, pp. 121–139, and at pp. 6–23, *supra*. It appears from that summary that there was adduced at this trial precisely the evidence which *Yates* held was needed to support a finding of Party advocacy of force and violence—evidence of systematic, personal indoctrination, not merely in the abstract principles and tenets of Marxism-Leninism, but in the necessity that Party members personally take part in the ultimate violent seizure of power in this country (under the Party's leadership) which the evidence so clearly established is and has always been the Party's ultimate aim and objective.[34]

[33] In *Yates*, the charge was that the defendants themselves had conspired to advocate violent revolution. (They were also charged with having conspired to organize as the Communist Party a society of persons who so advocated, but this portion of the charge was invalidated by this Court on grounds not now pertinent.) In a "membership" case, such as this, the charge is membership in an organization (namely, the Communist Party) which during the pertinent period so advocated, with the requisite knowledge and intent. The *Yates* holding of what properly constitutes advocacy of forcible overthrow under the Smith Act is thus equally germane and relevant to a membership case. The difference is that, whereas in a "conspiracy to advocate" case (such as *Yates*) it is necessary to prove that *the defendants*, personally, conspired to engage in the forbidden advocacy, in a "membership" case it suffices to prove that *the Party* (as such, and not necessarily including the defendant) engaged in the forbidden advocacy *and* that the defendant was a member of the Party with the necessary knowledge and intent.

[34] As petitioner points out (Pet. Br. 52), this Court had occasion in *Yates* to consider the evidence *in the Yates record* that the Communist Party advocated the forcible overthrow of the Government, and found such evidence wanting in respect of

An essential aspect of this personal indoctrination—explicit at times, but always implicit at the least—was the urging of all Party members and pupils in the multitudinous schools and classes which were so unceasingly being conducted to join forces with all other Party members at the critical time (when the "time was ripe" and the "signal was given") and personally take part in the forcible overthrow of the Government. In other words, this record compels the conclusion that it was the intention of the Party leaders and teachers, in indoctrinating Party members and pupils in the numerous classes and schools and personal briefing sessions held throughout the country ever since 1945, to advocate to such Party members and pupils—not merely that it would be a good thing if somebody, someday, overthrew the Govern-

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the requisite advocacy of forcible *action*. (The occasion of the Court's consideration of the *Yates* evidence on this issue was its inquiry into whether the Party could justifiably be viewed as "the nexus between these petitioners and the conspiracy charged" (354 U.S. at 330).) This determination, however, was limited to the proof on that issue adduced in that case. It is the Government's position in this case that the kind of proof which the Court found wanting in the *Yates* record concerning the nature of the Party's advocacy is present in this record. We disagree entirely, in short, with petitioner's contention that "the evidence in the two cases [*Yates* and the case at bar] is substantially identical" (Pet. Br. 52). With the exception of witness Lautner, not a single one of the witnesses in this case who testified with respect to the Party's advocacy of forcible overthrow—Hartle, Clontz, Childs, Reavis, Cummings, Duran and Jones—testified in *Yates*. Nor was the testimony of these witnesses a mere duplication, as petitioner claims, of testimony found wanting in *Yates*. See our discussion, *infra*, pp. 78–85, concerning significant aspects of their testimony, viewed in the light of the *Yates* standards.

ment by force and violence—but that they take part, *personally,* in a future violent seizure of power, when conditions are right and the summons to immediate action is received from the Party's leaders.

Thus, when the petitioner told witness Clontz in the course of his extensive personal indoctrination of that Party recruit that "we Communists in this country would have to start the revolution" and "could not expect the Soviet Union to land troops to start" it, but that, on the other hand, "we would have the benefit of" Russian help from the outset and "we naturally would continue to receive" such help until the revolution was victorious, etc. (*supra,* pp. 15–17), he was not indulging in "mere doctrinal justification of forcible overthrow" (*Yates,* 354 U.S. at 321), nor engaging in "advocacy in the realm of ideas" (*id.,* p. 320). He was indoctrinating Clontz in his duty, as a tested and disciplined Party member, to join forces with other Party members, when the time was propitious, in forcibly overthrowing this Government. He was advocating action—personal and violent action—by Clontz himself.

Again, when petitioner told Clontz that "it would be nice if revolutionary ideas would automatically produce a revolution," but that that "was impossible, that a militant force would have to bring about the revolution and that force was the only answer" (*supra,* p. 10), he was engaging in "indoctrination preparatory to action" (*Yates,* 354 U.S. at 322). This is equally true of the statement he made when he called Clontz's attention to the familiar passage in Stalin's *Problems of Leninism* in which Stalin rhetor-

ically asks—and answers emphatically in the negative—whether "such a radical transformation of the old Bougeois order" can "be achieved without a violent revolution"; petitioner "pointed out" to Clontz at that time, Clontz testified, that "this particular passage * * * simply prov[ed]" what he (petitioner) "already had taught"—that "education and reform would accomplish absolutely nothing" and that "violent revolution was the only possible way" to achieve the Party's objectives (*supra*, p. 15). Nor was petitioner engaging in mere advocacy in the realm of ideas when he urged Clontz to read Communist Party literature because it would "help prepare [him] for the time when the Communist Party would *call on* [*him*] *in time of crisis*" (*supra*, p. 11; emphasis added).[20] Indeed, the entire series of briefing sessions and personal conferences which petitioner had with Clontz (*supra*, pp. 8–19) were part and parcel of, and collectively constituted, a "call to forcible action at some future time"—a call which was being made upon Clontz by petitioner in the latter's official capacity

[20] Cf. Scarletto's testimony in the *Yates* case that he was surreptitiously indoctrinated in methods of moving "masses of people in time of crisis" (354 U.S. at 332). The Court indicated in *Yates* that this was the sort of evidence for which an appellate court should look in reviewing a Smith Act conviction. "It might be found, under all the circumstances," the Court said, "that the purpose of this teaching was to prepare the members of the underground apparatus to engage in, to facilitate, and to cooperate with violent action directed against government when the time was ripe" (*ibid.*). This, we submit, is what the evidence in this case overwhelmingly shows was the purpose of the indoctrination courses, classes, and briefing sessions which the Party as an organization and petitioner personally conducted for the benefit of Party members and recruits.

as a leader of the Party—in the sense of the *Yates* holding (354 U.S. at 329).

Petitioner was not the only Party leader shown by the evidence to have advocated forcible overthrow of the Government in the sense of a call to action. Consider, for example, the statements and teachings attributed by one of the witnesses to Party leader Art Bary, the District Organizer for a seven-state District in the Rocky Mountain area. As testified by witness Duran, Bary told the members of his Communist Party class in Evergreen, Colorado, that when the time for the revolution came "we would have to set up barricades, establish a central point from where we would participate from." "[B]ecause during the revolution it may become necessary to ebb, retreat in certain battles," Bary further told them, "we would have to learn to retreat in an organizational way * * *." "In the ebbing we were to see that we ebb before the enemy wiped everybody out. Ebbing to the central point that had been barricaded, reorganization, and then at the correct time start flowing forward in the revolution" (*infra*, pp. 138–139). "*We*," it is to be noted, are to engage in all this action. Bary was plainly doing more than "doctrinally justifying" revolutionary violence to his pupils, or simply defending violent revolution "as an abstract principle, divorced from any effort to instigate action to that end" (*Yates*, 354 U.S. at 318).

Similarly, at the National School for Mexican Cadres, conducted in 1951 in Los Angeles, Party leader Alberto Moreau, a member of the Party's National Education Commission, systematically indoctri-

nated his students in the need to "smash," "by force and violence," "the entire state machinery of the Bourgeoisie" as a preface to the bringing about of the "Socialist system" which all desired. "[F]irst we teach the people the desirability of overthrowing them [the capitalists]," counseled Moreau, "and then when the time is ripe we could stampede them against the capitalist class" (*infra*, pp. 137–138). Moreau also "stated to the class in a very emotional manner that he could see himself carrying a gun against the capitalist S.O.B.'s." And it was important, he stressed, that following the successful seizure of power the Party "collect * * * from the people" the "guns" with which they had been armed in order to ensure that they not be used in any "counterrevolution movement" (*infra*, p. 138). This sort of talk was certainly concrete and specific.

To cite one further example, the students of Party leader George Siskind, at the conclusion of the 1967 Party Training School in St. Louis, Missouri, were required to take a personal pledge, dictated by Siskind, to carry out the "will of the Party even though it meant to fight and to kill" (*infra*, p. 132). And during the preceding weeks of the School they had been indoctrinated, among other things, in the need to "take over" the citadels of capitalism and "wipe them out" (*infra*, p. 132).[*]

[*] See also *infra*, pp. 127, 128, 131, 132, 134, for other instances of statements and teachings by Party leaders which, we submit, cannot fairly be reconciled with the theory that nothing more than the "abstract principle" of political violence was taught by the Party during the pertinent period in its schools and classes and personal indoctrination sessions.

Collectively considered, the testimony constituted the sort of testimony which this Court, in *Yates*, referred to as meeting the evidentiary requirements of the Act, *viz.*, testimony of "Party classes * * * where there occurred what might be considered to be the systematic teaching and advocacy of illegal action which is condemned by the statute" (354 U.S. at 331). From the extensive testimony of this sort to be found in this case, even more than from the comparable testimony alluded to in *Yates*, "[i]t might be found that one of the purposes of such classes was to develop in the members of the group a readiness to engage at the crucial time, perhaps during war or during attack upon the United States from without, in such activities as sabotage and street fighting, in order to divert and diffuse the resistance of the authorities and if possible to seize local vantage points" (*ibid.*)."

To sum up, the evidence amply supports the conclusion that the Party members and pupils in the numerous schools and classes and indoctrination talks which the Party conducted understood that they were being called upon, *personally*, to take part in the

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" *Yates* also cited, as an example of the type of evidence which would meet proper evidentiary standards in a Smith Act prosecution, testimony in that case from which "it might be found that individuals considered to be particularly trustworthy were taken into an 'underground' apparatus and there instructed in tasks which would be useful when the time for violent action arrived" (354 U.S. at 332). Compare the testimony in this case concerning the establishment of an elaborate "underground apparatus," seven levels deep, consisting of the most trusted and disciplined ten percent of the Party membership (*infra*, pp. 133–134). Petitioner himself, in December 1951, disappeared into this "underground" (*supra*, p. 18).

future violent *putsch* which it was the common intention to bring to pass at the earliest feasible opportunity. The Party leaders who conducted these schools and classes and personal briefing sessions intended that their indoctrinees so understand, and, indeed, openly called upon them to join forces with their fellow Party members in the forcible seizure of power when the call to imminent action came. This is what the jury found, under instructions which were carefully framed in the light of the *Yates* decision. And it is this sort of advocacy, we think it clear, that this Court meant when it referred in *Yates* to "advocacy or teaching in the sense of a call to forcible action at some future time" (354 U.S. at 329). For it "cannot [be]," as observed by Chief Justice Vinson in the *Dennis* case, 341 U.S. at 509, "that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If [the] Government is aware that a group aiming at its overthrow is *attempting to indoctrinate its members* and to *commit them to a course whereby they will strike when the leaders feel the circumstances permit,* action by the Government is required" (emphasis added). These words sum up, and fairly epitomize, what it was that the Party, as established by the evidence in this case, was doing during the period covered by this indictment.

In a Smith Act case no less than in other kinds of criminal cases it is for the jury to judge the credibility of the witnesses and to determine what inferences are to be drawn from the evidence (*Pieres* v.

*United States*, 252 U.S. 239, 251), and inferences that might reasonably be drawn must, in deciding whether the evidence is sufficient, be viewed in the light most favorable to the Government. *Glasser* v. *United States*, 315 U.S. 60, 80; *United States* v. *Manton*, 107 F. 2d 834, 839 (C.A. 2), certiorari denied, 309 U.S. 664. On that basis, it is submitted that the jury's finding that the Communist Party, during the pertinent period, taught and advocated the forcible destruction of this Government in the sense of the *Yates* holding, and under instructions which were approved in *Yates*, is fully supported by the evidence.

B. THE JURY'S FINDING THAT PETITIONER KNEW THE PARTY'S CHARACTER AS AN ORGANIZATION WHICH ADVOCATED FORCIBLE GOVERNMENTAL OVERTHROW IN THE *YATES* SENSE, AND THAT HE PERSONALLY INTENDED TO BRING ABOUT THAT RESULT AS SPEEDILY AS CIRCUMSTANCES WOULD PERMIT, IS LIKEWISE SUPPORTED BY THE EVIDENCE

Acknowledging his role as a Party functionary, petitioner contends (Pet. Br. 56–59) that the evidence is insufficient to show his knowledge of the Party's character as a society of persons who advocated the forcible overthrow of this Government in the *Yates* sense, and his intent to bring to pass that result as speedily as circumstances would permit. Of course, petitioner's status as a *leader* of such a rigidly disciplined and indoctrinated organization is in itself strong evidence against the suggestion that he might not have known what the Party was about or might not have purposed the furtherance of its ends. However, the record goes far beyond this and shows not only that petitioner was "in contact with" the Party's aims (Pet. Br. 56), but that he himself actively taught and

advocated the violent overthrow of the Government in the sense condemned in *Yates*.

In the years between 1948 and 1951, petitioner acted as a personal tutor to the witness Clontz, supplying him with volumes of Communist Party literature and explaining to him the Party's vanguard role in the coming proletarian revolution (*supra*, pp. 8–19). As we have seen, some of the clearest evidence in the record that *the Party* advocated this Government's forcible destruction in the *Yates* sense emanated from petitioner's own lips, in his tutoring of Clontz (*supra*, pp. 9-18). Some of this evidence was discussed in the preceding section of this brief (*supra*, pp. 79–81), and it is plain that that evidence has equally cogent force on the issue of petitioner's knowledge and intent.

There is other substantial evidence. Petitioner directed the witness Childs to remain in industry where there were unions because the Communist Party considered that trade unions "are the schools of revolution" (*supra*, pp. 20–21). In 1952, petitioner was instrumental in establishing, and was in fact the director of, the secret Communist Party training school at Walnut Cove, North Carolina, at which Childs and other Party members were indoctrinated in the Party's revolutionary goal and the tactics for achieving it (*supra*, pp. 21–23).

Reflecting and acting upon the revolutionary purposes and teachings of the Party, petitioner explained to Clontz the nature and importance of underground activities (*supra*, pp. 13, 18). He said that "if war came" he would go underground himself (R. 302; Tr.

1113). And in December 1951, during the fighting in Korea, he in fact went underground, pursuant to orders of the national Party headquarters (*supra*, p. 18). In these activities, petitioner gave concrete point to the revolutionary doctrines he taught and followed (see *supra*, pp. 12–13), vividly belying his effort now to deny the evidence of his intimate knowledge and unlawful intent with respect to the Party's objectives.

Given the nature of the offense, it would be absurd to expect, and it is not required, that there be even more extensive evidence in the form of explicit statements by the petitioner himself announcing his knowledge and intent. Those we have summarized are numerous and damaging enough. Together with the unquestioned fact that petitioner was a Party member and its leader in the Carolinas, and bearing in mind the proof of the duties and activities such a role entailed, we submit that on this record it would have been incredible to suppose that petitioner was ignorant of the Party's aims or lacking in intent to help achieve them. At least, the jury clearly had ample ground for finding the requisite knowledge and intent.

The Court of Appeals correctly observed that (R. 478–479):

> The evidence in regard to Scales himself not only reinforces the conclusion as to the character of the Communist Party but justifies his conviction of charges contained in the indictment. * * * [He] was a prominent and active member of the organization, who served as chairman of the Carolina District of the Party

> and was active in recruiting suitable Party members amongst the university students in North Carolina, and * * * he furnished them with Communist literature and advised and instructed them as to the Party doctrines and arranged for their attendance at established Communist schools where formal classes of instruction were given. He himself was a director of one of these schools and in harmony with their course of instruction, as above described. He himself in his contacts with new members consistently and repeatedly preached the revolutionary doctrine that, in the interest of the proletariat, the institutions of the state must be destroyed by force and violence as soon as it was reasonably possible to do so. He was constantly in touch with the national leaders of the organization and obeyed their instruction that he should go underground under an assumed name.

The court accordingly was correct in concluding that (R. 477):

> Taking this evidence in the light most favorable to the prosecution, which must be done if the historic function of the jury is to be recognized, it is fair to say that, contrary to the appellant's contentions, the allegations of the indictment have been sustained.[38]

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[38] Similarly, the Court of Appeals on the former appeal concluded, on the basis of the evidence adduced at the first trial (*Scales* v. *United States*, 227 F. 2d 581, 593):

"* * * Uncontradicted testimony as to statements by him showed that he was thoroughly aware of the unlawful aims and purposes of the party, was in sympathy with those aims and purposes and entered into its activities with complete under-

## IV. PETITIONER RECEIVED A FAIR TRIAL

### A. THE DENIAL OF PETITIONER'S MOTION CHALLENGING THE COMPOSITION OF THE GRAND JURY WAS PROPER

Petitioner urges that the trial court committed prejudicial error in refusing to grant his motion challenging the composition of the grand jury which indicted him (Pet. Br. 59–61). The pertinent facts are as follows: [39]

After his arrest on November 18, 1954, petitioner first appeared in court on December 7, 1954. His request for a one-week extension for the purpose of securing counsel was granted. On December 16, he again appeared before the court for arraignment, but was still not represented by counsel. The court thereupon appointed two members of the bar to represent him for purposes of the arraignment. On that day, he entered a plea of not guilty, reserving the right to file appropriate motions by January 14, 1955, and specifically reserving his right to challenge the composition and array of the grand jury.

On December 22, 1954, petitioner was released on bail. On January 14, 1955, the date fixed by the court for the filing of appropriate motions, he was represented by a New York attorney who requested sixty additional days in which to file motions. Act-

standing of what was involved. On the evidence before it, the jury was amply justified in finding him guilty of the crime charged * * *."

[39] The essential facts pertinent to this issue, which are recited in the following four paragraphs, are also set forth in the trial judge's "Finding of Fact, Conclusion of Law, and Order" of April 15, 1955, reproduced in Appendix B, *infra*, pp. 140–145.

ing on this request, the court granted an extension to February 18, 1955, by which time the petitioner was to file his motions, and the court fixed April 11, 1955, as the date for the commencement of the (original) trial. Petitioner's counsel announced complete satisfaction with the dates as set.

On February 18, 1955, petitioner, again represented by new counsel of his own choosing, filed motions to dismiss the indictment on constitutional and other grounds, for a bill of particulars, for the return of seized property and the suppression of evidence, for discovery and inspection pursuant to Rule 16 of the Federal Rules of Criminal Procedure, for pretrial inspection of documents under Rule 17(c), to strike portions of the indictment, and for continuance of trial.

Argument on these motions was heard by the court on March 8, 1955, and at this time petitioner's counsel advised the court of his intention to file a motion challenging the method of selecting the grand jurors despite the Government's announced intention to object to the filing of such a motion on the ground that it would be untimely. Petitioner subsequently filed the motion together with a challenge attacking the method of selecting the trial jury. On April 1, 1955, the court, reserving to the Government its objection to the motion challenging the grand jury, conducted a hearing on the method of selecting jurors, since the evidence as to each of the two motions was necessarily the same in substance. At the conclusion of the hearing, the court denied the motion attacking the grand jury panel because

(1) the motion was not timely filed and
(2) the evidence produced at the hearing failed to show that the method of selecting jurors was improper [Motion Tr. 150–153].[40]

The motion challenging the petit jury also was denied.[41] Thus, each of the two grounds of denial of the motion challenging the composition of the grand jury is independently sufficient to sustain the ruling. We submit that the denial was correct on both grounds.

### 1. *Petitioner waived the right to challenge the composition of the grand jury*

As appears from the facts as just set forth and in the trial court's undisputed findings (Appendix B, *infra*, pp. 140–145), petitioner, after being arraigned on December 16, 1954, was granted two lengthy extensions totaling 64 days in which to file pre-trial motions. At the end of these extensions, on February 18, 1955, petitioner filed numerous pre-trial motions but not the one now in question attacking the composition of the grand jury. This motion was not filed

[40] "Motion Tr." refers to the typewritten transcript of the hearing held on April 1, 1955, on the pre-trial motion challenging the method of selecting jurors.

[41] The trial court observed that a revised list of prospective jurors was being prepared by the jury officials (Motion Tr. 153–154), and when petitioner's counsel agreed that the method of selection of this revised list was satisfactory to him (Motion Tr. 154–164), the court quashed the then existing venire of petit jurors and ordered a new panel drawn under the revised method of selection (Motion Tr. 164), from which the jury which returned the original verdict was selected. There was thus no issue on the former appeal as to the legality of the constitution of the petit jury. Similarly, there is no issue in the present appeal as to the validity of the constitution of the jury which returned the verdict at the second trial.

until March 8, 1955, more than two weeks after the ample extensions granted by the trial court had expired. The court found (Appendix B, *infra*, p. 142), and there is no contrary suggestion, that the information on which this belated additional motion was based had been available to defendant and his counsel from the time of the indictment, and that there had been not even an attempt to explain or justify the inordinate delay.

In these circumstances, as held by the Court of Appeals (R. 493–495), the trial court was clearly justified in rejecting the motion as untimely. Under Rule 12 of the Federal Rules of Criminal Procedure, such a motion must be made before the plea is entered or "within a reasonable time thereafter" when permitted by the court. Failure to present the motion within the prescribed time constitutes a waiver. *Carruthers* v. *Reed*, 102 F. 2d 933, 939 (C.A. 8); *Redmon* v. *Squier*, 162 F. 2d 195, 196 (C.A. 9); *Wright* v. *United States*, 165 F. 2d 405, 407 (C.A. 8); "Notes of Advisory Committee on Rules" following Rule 12, p. 2532 in 18 U.S.C. The Rule provides that "for cause shown" the court "may grant relief from the waiver." But no cause was shown here and there is no basis for questioning the propriety of the decision that the waiver effectively barred the complaint against the grand jury. *Frazier* v. *United States*, 335 U.S. 497, 503; *Shaw* v. *United States*, 1 F. 2d 199, 201 (C.A. 8); *Nations* v. *United States*, 52 F. 2d 97, 99 (C.A. 8); *Moffatt* v.

*United States*, 232 Fed. 522, 528 (C.A. 8); *Hornbrook* v. *United States*, 216 F. 2d 112 (C.A. 5).

2. *In any event, the complaint is on its merits not ground for reversal of the conviction*

Petitioner premises almost his entire argument on this point upon his allegation that it was impossible for the Jury Commission to know whether the jury box contained the requisite 300 names of qualified persons at the time of drawing (Pet. Br. 60), and that there was, therefore, a failure to meet the requirements of 28 U.S.C. 1864. This contention is rebutted by the evidence adduced at the hearing.

The Deputy Clerk testified that, at the time the indicting grand jury panel was drawn, the jury box contained, as an estimate, "something in the neighborhood of probably five hundred" names (Motion Tr. 83).[a] He further stated that he had been a resident of the county from which the names were drawn for nearly 70 years, had "canvassed the county several times," and had "been in the Legislature several sessions;" that as a result he had a "pretty good knowledge of the people there, their background and their present status;" and that it had been his experience that the jurors drawn for service had represented a "cross-section of all walks of life in [the] community" (Motion Tr. 84–85).

The Clerk of the District Court testified that the

[a] Elsewhere in his testimony he estimated the number of names as "probably four hundred, four hundred and fifty or five hundred, somewhere around there" (Motion Tr. 84). In any event, he was "satisfied," he testified, that the number was "more than three hundred" (*id.* 83).

procedure used by the Commission in selecting names for the jury box [4] had been commended by members of the bar throughout the district and by others for the fairness of the jurors serving in the courts (Motion Tr. 48, 49). This witness also testified that the procedure used had been discussed with inspectors from the Administrative Office of the United States Courts and with other clerks and visiting judges; and that he had found this to be "substantially the procedure followed elsewhere," uncriticized by any of these sources (Motion Tr. 51).

Aside from the foregoing, no testimony was adduced by petitioner as to the number of qualified names in the box at the time of the grand jury selection. It is thus evident that the inference petitioner would have this Court draw falls far short of rebutting the presumption of regularity which attends the work of the Jury Commissioner and Clerk of the court, a presumption which may be overcome only by clear and convincing proof. *Frazier* v. *United States*, 335 U.S.

[4] In selecting names for the grand and petit juries, requests were sent out on form letters, under the joint direction of the Clerk and Jury Commissioner, who constitute the Jury Commission, to men of knowledge, character and standing who know the people in the respective counties, asking them to send in suitable names for jury service (Motion Tr. 18-30). Upon the return of these forms, the commission determined the eligibility of the names submitted and eliminated those found to be ineligible to serve. The eligibility was determined by the Clerk or Jury Commissioner's personal knowledge of the individuals' names or from comments of the persons requested to send the names. All names not eliminated by this process were then placed in the jury box on separate cards indicating the names and addresses of the persons selected (Motion Tr. 33-35).

497; *Fay* v. *New York*, 332 U. S. 261; *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217. In addition, even if it be assumed *arguendo* that the Jury Commission was not certain that there were 300 *qualified* names in the jury box at the time of the drawing, this fact standing alone is an insufficient basis, without a showing of prejudice, upon which to nullify an indictment."[44]

And, far from suggesting prejudice, the record demonstrates that there was none. The testimony showed that the Clerk never intentionally or systematically excluded any class or group and that he sought a wide selection of jurors from all walks of life (Motion Tr. 47–48). Acting on the express direction of the District Court, the Jury Commissioner made special efforts to secure women and Negro jurors (Motion Tr. 25), and there was no exclusion whatever of minority political or racial groups (Motion Tr. 58). As observed by the court below, "It does not appear from the evidence that any qualified person or class of persons was excluded from jury service or that any disqualified person served on the grand

[44] "Does this statute mean that there must be 300 names in the box of qualified persons as a condition of any valid drawing of any jurors therefrom? If this was the meaning of Congress it would involve the duty on the part of the commissioners of determining in some reliable manner the question of eligibility, and would have rendered it necessary for the legislature to have proceeded further and to have granted them authority and process for hearing and determining the matter in a *quasi*-judicial manner; but they are not triers, nor have they the power to appoint triers. I do not think this is the meaning of the statute." *United States* v. *Rondeau*, 16 Fed. 109, 111 (E.D. La.).

jury chosen in this case or that the defendant was in any way prejudiced by the procedure" (R. 493).

On this record, petitioner cannot prevail in his argument (Pet. Br. 61) that, because the Clerk and Jury Commissioner sent letters to various individuals and leaders of organizations seeking suggested names, they unlawfully delegated their duties so that the indictment must now be quashed. Disposing of a similar contention, the Court of Appeals for the Third Circuit has said (*Dow* v. *Carnegie-Illinois Steel Corporation*, 224 F. 2d 414, 427):

> The jury officials could in the exercise of their discretion resort to others for the suggestion of names so long as it could reasonably be expected that a cross-section would thereby be obtained, and using the names taken from such a variety of sources does not result in an unlawful delegation of duty by the officials.

The evidence here gives every reason to believe that a proper cross-section was obtained and that the jury officials duly exercised their duty of selection. As the Third Circuit observed in the *Dow* case (*supra*, at 427), such circumstances leave no basis for invoking the rule of *Glasser* v. *United States*, 315 U.S. 60, where the vice was solicitation of names from only a single organization with a resulting list improperly weighted. See also *United States* v. *Dennis*, 183 F. 2d 201, 218 (C.A. 2), affirmed on other issues, 341 U.S. 494; *United States* v. *Flynn*, 216 F. 2d 354, 378-389 (C.A. 2), certiorari denied, 348 U.S. 909; *Walker* v. *United States*, 93 F. 2d 383, 391 (C.A. 8), certiorari denied, 303 U.S. 644.

It may be noted, finally, that, after denying the

motion challenging the grand jury selection as untimely and also on the merits, the trial court observed that a revised list of prospective jurors was then being prepared by the jury officials involved in this case (Motion Tr. 153–154). Petitioner's trial counsel agreed that the method of selection of the revised list of jurors was satisfactory and met all his objections (Motion Tr. 154–164). Accordingly, the court quashed the then existing venire of petit jurors and ordered a new panel drawn under the revised method of selection (Motion Tr. 164). See footnote 41, *supra*, p. 91. It would appear, therefore, that any defect of which petitioner could have made timely complaint has disappeared for the future. In view of the complete absence of prejudice, and apart from other reasons already stated, there is no sound basis in petitioner's tardy motion for invoking the supervisory powers of this Court.

B. THE CONGRESSIONAL FINDINGS IN THE INTERNAL SECURITY ACT OF 1950 AND THE COMMUNIST CONTROL ACT OF 1954 DID NOT PRECLUDE A FAIR TRIAL

Petitioner next urges (Pet. Br. 62) that, without a shred of concrete evidence of prejudice, it must be presumed that he could not have had a fair trial because Congress, in the Internal Security Act of 1950 (50 U.S.C. 781) and the Communist Control Act of 1954 (50 U.S.C. 841), made findings that the Communist Party aims at the violent overthrow of the Government.[45]

[45] This contention was first made by petitioner in his petition for a writ of certiorari to review the former judgment of the Court of Appeals (No. 626, Oct. Term, 1955 [No. 29, Oct. Term, 1956; No. 3, Oct. Term, 1957], pp. 2–3, 44–45.

The argument proceeds on the unrealistic and unacceptable assumptions, without proof, that the jurors (1) were in fact familiar with the statutes in question and (2) ignored the court's instructions to determine the nature of the Communist Party from the evidence before them for themselves, and merely followed unthinkingly the findings of Congress in the Internal Security Act and the Communist Control Act. These assumptions attack the basic premises of the jury system itself. If they are correct, it must follow that every Smith Act conviction which has been returned since 1950 has been erroneous on this ground alone and that the Communist Party, by becoming a threat so grave as to require explicit recognition by Congress and much of the public, has immunized its organizers and members against prosecution. As the Court of Appeals for the Seventh Circuit said, rejecting the same argument, in *United States* v. *Lightfoot,* 228 F. 2d 861, 870, reversed on other grounds, 355 U.S. 2:

> In effect, it is defendant's position that all persons subject to prosecution under the Smith Act are immunized from prosecution indefinitely, or at least as long as the Communist Control Act remains a part of the laws of this nation. We do not agree. If any jury had any such prejudgment, the instructions of the Court cured their error. Furthermore, whether any such belief existed in the mind of any juror, might have been discovered on the *voir dire* examination.

Petitioner was certainly entitled to investigate, in this as in any other case, to determine whether the

jurors might be disabled by bias from trying him fairly. But the conclusive presumption of bias he seeks to establish rests only on a speculative hypothesis which cannot avail to impugn the jury's verdict. Compare *Accardi* v. *Shaughnessy*, 347 U.S. 260, with *Shaughnessy* v. *Accardi*, 349 U.S. 280.

### C. THE "JENCKS" ACT'S EXCISION PROCEDURES ARE VALID, AND THEIR APPLICATION TO PETITIONER'S TRIAL DID NOT VIOLATE THE CONSTITUTIONAL PROHIBITION AGAINST *EX POST FACTO* LEGISLATION

Petitioner challenges the validity, in two respects, of the so-called "Jencks" Act (Public Law 85–269, approved September 2, 1957, 71 Stat. 595, adding a new section, § 3500, to Title 18 of the U.S. Code), and further argues that, in any event, its application to his trial violated the constitutional prohibition against *ex post facto* legislation (Pet. Br. 63–64). We show, first, that his challenge of the excision procedures of the Act (subsection (c) of § 3500) is without merit; second, that the question of the validity of the Act's definition of "statement" (subsection (e)) does not arise on this record; and, third, that the *ex post facto* contention is unavailable to petitioner because it is made for the first time in this Court and that it is without substance in any event.

#### 1. *The excision provisions of the "Jencks" Act are fully consonant with due process*

At the re-trial below—which was necessitated because of the error of the first trial court in refusing to order the production for cross-examination use by the defense of prior reports to the FBI by prosecution witnesses touching upon the subject matter of their

testimony [46]—the procedure followed with respect to the production of such reports was (with a qualification to be mentioned; see *infra*, pp. 108–110) that prescribed by 18 U.S.C. 3500, as added by the "Jencks" Act. Subsection (b) of that section,[47] provides that the trial court in any criminal prosecution brought by the United States shall, on motion of the defendant, after a witness called by the United States has testified on direct examination, "order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." The same subsection then directs that, "[i]f the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use." It is then provided in subsection (c)—the subsection here in issue—that:

> (c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such ma-

[46] *Scales* v. *United States*, 355 U.S. 1, reversing 227 F. 2d 581 on the authority of *Jencks* v. *United States*, 353 U.S. 657.

[47] The full text of the section appears at pp. 7a–9a of the Appendix to petitioner's brief.

> terial excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. * * *

Petitioner challenges, on due process grounds, the validity of this excision procedure (Pet. Br. 63–64). Basing his argument on *Jencks* v. *United States*, 353 U.S. 657, he contends that "only a right of full access to witnesses' reports serves to protect the opportunity of the defense for full exercise of its right of cross-examination" (Pet. Br. 64). The argument is untenable for two reasons.

(*a*) Assuming *arguendo* that the *Jencks* decision is based on constitutional grounds (but see *infra*, pp. 106–108), the statutory excision procedure is fully consonant with *Jencks*.

Clearly, the mere fact that a government witness has in the past given a statement to a government agent on matters relating to the subject matter of his trial testimony would not require that *all* past statements by this witness to government agents—on any subject whatever—be turned over to the defense. Petitioner makes no such claim and the *Jencks* deci-

sion makes no such suggestion." It is only statements which *relate to the subject matter of the witness' testimony* that must be turned over. But there is no more reason for turning over to the defense non-germane portions of a witness' statement which is in part germane (because it touches on—but only in part—the subject matter of his testimony) than there is for turning over a statement *no* part of which is pertinent to that subject matter. As the Court of Appeals for the Tenth Circuit has observed, "Surely, if an entire statement can be refused when it does not relate to the subject [of the witness' testimony], it is entirely proper to deny access to a part of a statement on the ground that such part does not have the necessary relationship. * * * Unless some provision is made for the restriction of production to matters related to the testimony of the witness, the door is

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" On the contrary, *Jencks* clearly indicates that statements of the witness which do not relate at all to the subject matter of his testimony are not required to be produced: "Relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established *when the reports are shown to relate to the testimony of the witness*" (353 U.S. at 669; emphasis added). And in its precise holding the Court said: "We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F.B.I., *touching the events and activities as to which they testified at the trial*" (353 U.S. at 668; emphasis added). Again: "We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses *touching the subject matter of their testimony at the trial*" (353 U.S. at 672; emphasis added).

opened for 'the broad or blind fishing expedition' which the Supreme Court has condemned" (*Sells* v. *United States*, No. 5992, decided December 30, 1958, slip opinion, pp. 26–27, pending on petition for a writ of certiorari, No. 691, Misc., this term).

The defendant is fully protected against the possibility of an erroneous or arbitrary ruling by the trial judge as to the non-germane portions of a statement germane in part. He is entitled under subsection (c) of the Act (*supra*, pp. 100–101)—and that procedure was followed here (see opinion below, R. 489–490)—to have the entire statement preserved for inspection by the appellate court, and a determination by that court of the correctness of the trial judge's rulings with regard to excision, in the event that the defendant is convicted and elects to appeal.[50] The statutory procedure thus protects the accused's proper cross-examination rights while at the same time safeguarding the privacy of government records in which the accused has no proper interest.

Petitioner quotes from the *Jencks* opinion (Pet. Br. 63–64) language which he claims supports his contention that statements to a government agent by a prosecution witness which are relevant in part (be-

[50] To the same effect, see the opinion below at R. 490–491.

[50] The court below stated in its opinion: "We have examined [the original unexcised reports of the Government witnesses] to determine the correctness of the rulings of the trial judge and we concur in his finding that the excised portions of the reports did not relate to the subject matter of the testimony of the witnesses" (R. 489–490). The reports, in their excised and unexcised forms, have been lodged with the Clerk of this Court for this Court's inspection if it should desire to make a similar determination.

cause they refer in part to matters concerning which he has given testimony) must be made available to the defense in their entirety for cross-examination purposes. But the *Jencks* opinion is careful to limit its ruling as to production of reports to matters "touching the events and activities as to which" the witness testified at the trial, or "touching the subject matter of their testimony at the trial". 353 U.S. at 668, 669, 672; see footnote 48, *supra*, p. 102. The thrust of the opinion, as of the decision, is that only the defense can adequately appraise the value for impeachment purposes of statements of a prosecution witness which *in fact* touch upon or relate to a matter concerning which he has testified. But the question of whether a statement of the witness relates in fact to a subject or topical area with respect to which he has testified is a question which the judge is able to decide without assistance from the defense.

Indeed, the latter question, *i.e.*, whether a witness' statement *does relate to or touch on* his testimony, must be determined by the judge without participation by the defense. For the defense obviously cannot join in that decision without being made privy to the very statement which the Government claims does not relate to or touch upon the witness' testimony and for that reason (since the statement is part of the Government's confidential files) should not be seen by other than authorized persons. Petitioner's contention, in short, begs the question. For his argument is, in essence, that the defense is entitled to see a statement of a witness contained in the Government's confidential files in order to determine for

tself whether the Government is correct in maintaining that the statement, because of its confidential character and because it in no way relates to the subject matter of the witness' testimony, should not be seen by the defense.

If petitioner were correct, it would be difficult to see why the defense would not equally be entitled to examine every statement in the investigative files which had ever been made by the witness on any subject whatever, since the reason asserted why the accused should be made privy to the entire contents of a document relevant only in part would apply with equal force to papers and documents in the files containing statements of the witness wholly irrelevant, in fact, to anything contained in his testimony, *viz.*, to enable the defendant and his counsel to determine for themselves if such is the fact. See the Tenth Circuit's remarks in the recent *Sells* case (*supra*, pp. 102–103). As we have noted, petitioner himself makes no such broad claim, and there is nothing in the opinion in *Jencks* which lends support to any such idea or to the comparable rule for which petitioner does contend. As aptly remarked by the court below (R. 490–491):

> [T]he new statutory procedure does not deny the defendant access to any information which would be helpful to his case. Production of the reports for inspection does not depend upon the permission of Government custodians or the attorneys for the prosecution; and the determination of what portions of the reports should be excised is not left to the Government

but is entrusted to the impartial and experienced judgment not only of the trial judge but also the judges of the appellate courts and the Justices of the Supreme Court themselves, if in their discretion they determine to review the case. * * *

The defense is denied only the opportunity to be heard on the question whether the excised portions of the reports bear on the testimony of the witnesses; and this does not amount to a denial of due process. It does not interfere with any constitutional right to which the defendant is entitled but merely restricts his examination of the Government files which he desires to make, not because he has any reason to believe that they will yield anything helpful to his case but on the chance, which costs him nothing, that something will be turned up that will weaken the prosecution. In this situation it is clearly within the province of Congress to protect the right of the United States to withhold facts which it has gathered and to shield the sources of its information in the public interest so long as no pertinent information is withheld from the defendant. This can be done only by entrusting the determination of relevancy to someone other than the parties to the cause, and the method devised by Congress is obviously fair both to the Government and to the defendant and represents a reasonable exercise of Congressional power. * * *

(*b*) What we have said thus far has assumed *arguendo* that *Jencks* was based on constitutional grounds of due process. We believe, however, that this Court did not in that case purport to lay down a basic rule of constitutional law, but rather (pursuant

to its general supervisory powers over the administration of justice in the federal courts) a procedural principle, analogous to a rule of evidence, to be applicable in federal criminal trials in the absence of a definitive statute. In holding that the trial court had erred in failing to order the production of the statements of Ford and Matusow, the Court said that it was following its prior decision in *Gordon* v. *United States,* 344 U.S. 414. It clarified that decision by holding that (contrary to the views of the lower courts in *Jencks*) "a preliminary showing of inconsistency" between the witness' testimony and his prior statement was not, under *Gordon,* a "prerequisite to" the accused's right to inspect the prior statement (353 U.S. at 666–667). But *Gordon* was decided, not on constitutional principles, but on the basis of "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience" and "[*i*]*n the absence of specific legislation*" (344 U.S. 418; emphasis added). It would follow, therefore, that the *Jencks* decision likewise was based on common law principles, as interpreted in the light of reason and experience, and did not purport to lay down a fundamental principle of due process, beyond the power of Congress to alter or amend by legislation.

In the words of the opinion below, "In the *Jencks* decision the Supreme Court was not dealing with constitutional questions. It was exercising what is described in *McNabb* v. *United States,* 318 U.S. 332, [3]40, [3]41, [as] 'its supervisory authority over the administration of criminal justice in the United States

* * * by the establishment of civilized standards of procedure and evidence'; and Congress, by the passage of the interstitial legislation contained in § 3500 was merely exercising its concurrent power in the same field to provide for a case that the Court did not envisage" (R. 491).[51]

For further discussion, see the Brief for the United States in *Rosenberg* v. *United States,* No. 451, this Term.

2. *The question of the validity of the "Jencks" Act's definition of "statement" does not arise on this record*

The second respect in which petitioner challenges the constitutionality of Section 3500 relates to the definition of "statement" in subsection (e). The term is there defined as (Pet. Br. App. 8a–9a)—

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
>
> (2) a stenographic, mechanical, electrical, or

[51] This conclusion has the support also of such decisions as *United States* v. *De Lucia*, 262 F. 2d 610, 614 (C.A. 7), pending on petition for a writ of certiorari, No. 745, this term; *United States* v. *Spangelet*, 258 F. 2d 338, 340–341 (C.A. 2); *United States* v. *Lev*, 258 F. 2d 9, 13 (C.A. 2), pending on writ of certiorari, Nos. 435, 436, 437, this Term; *United States* v. *Palermo*, 258 F. 2d 397, 400 (C.A. 2), pending on writ of certiorari, No. 471, this Term; *United States* v. *Gandia*, 255 F. 2d 454 (C.A. 2); *United States* v. *Angelet*, 255 F. 2d 383 (C.A. 2); *United States* v. *Miller*, 248 F. 2d 163, 165 (C.A. 2), certiorari denied, 355 U.S. 905. See also *United States* v. *Sheba Bracelets*, 248 F. 2d 134, 144–146 (C.A. 2), certiorari denied, 355 U.S. 904; *United States* v. *Rosenberg*, 257 F. 2d 760, 763 (C.A. 3), pending on writ of certiorari, No. 451, this Term; *United States* v. *Consolidated Laundries Corporation*, 159 F. Supp. 860, 868, n. 15 (S.D.N.Y.).

> other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

This definition, petitioner argues, "is so arbitrary, capricious and unreasonable that it violates the due process clause. Statements by prosecution witnesses may be useful for impeachment whether or not the witnesses signed or subsequently 'approved' them and whether or not they are 'substantially verbatim' or 'recorded simultaneously' " (Pet. Br. 64).

While we think petitioner's challenge untenable because this is an area of trial practice which it is proper for Congress to regulate by statute (see *supra*, pp. 106–108),[52] the question need not be reached here. In this case the *Jencks*-type materials which were in fact turned over to the defense were not limited to "statements" of the type defined in subsection (e), but included agent-prepared summaries (if any) of oral statements made by the witnesses to the F.B.I. The Government, in making available to the defense the records of prior statements to the F.B.I. by prosecution witnesses touching upon the subject matter of their testimony, did not limit itself to statements of the kind defined in subsection (e), but turned over everything which was conceivably demandable under the *Jencks* decision, without regard to the subsection (e) definition. There is, accordingly, no basis for this

[52] See also the Briefs for the United States in *Lev*, *Wool* and *Rubin*, Nos. 435–437, this Term; *Palermo*, No. 471; and *Rosenberg*, No. 451.

petitioner's challenge to the subsection (e) definition; he is seeking to argue, in the abstract, a theoretical question which has no pertinency to the facts of his case.[53]

3. *The contention that the application of the "Jencks" Act to petitioner's trial violated the constitutional ban on ex post facto legislation is unavailable because made for the first time in this Court, and is in any event without substance*

Petitioner's final contention pertaining to the "Jencks" Act is that the application of that Act "in the present case violated the Constitutional ban (Art. I, Sec. 9) on *ex post facto* legislation" because his "alleged crime was committed before the enactment of this statute" (Pet. Br. 64).

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[53] In neither court below did petitioner contend that he had not been shown documents which he was entitled to see despite the limitations of subsection (e) of the statute. Rather, petitioner confined his objections to the excision of portions of documents otherwise made available to him—a point discussed *supra*, pp. 99–108. Because this contention was not raised below the Government had no occasion prior to the filing of its memorandum in reply to the petition for a writ of certiorari to place upon the record the fact which it therein asserted (at p. 9)—*i.e.*, that all relevant documents were made available to petitioner regardless of the subsection (e) limitations of the "Jencks" statute.

In *United States* v. *Lev*, No. 435, this Term, *supra*, failure to make a document available to the petitioner at the trial was held to be harmless error because, were a retrial to be ordered, the document would nevertheless be unavailable to the defense under the new statute. Here, somewhat the converse situation exists: any supposed defect in subsection (e) has no bearing on this case because petitioner was, in fact, shown all that he was entitled to see irrespective of the subsection (e) restrictions.

(*a*) In the first place, this argument was not urged either in the District Court or in the Court of Appeals; it was made for the first time in this Court (in the petition for a writ of certiorari, at p. 28). It is, accordingly, not available to petitioner at this time. Cf. *Yakus* v. *United States,* 321 U.S. 414, 444–445; *Lawn* v. *United States,* 355 U.S. 339, 362–363, n. 16; Rule 51, F.R. Crim. P.

(*b*) In any event, this *ex post facto* contention is on its merits clearly without substance.

We have seen (*supra,* pp. 99–110) that the only provisions of the "Jencks" Act of which petitioner can complain are those relating to the excision procedures prescribed by subsection (c). And, as we have argued (*supra,* pp. 101–106), these provisions are wholly consonant with due process of law and with the holding and rationale of the *Jencks* decision, 353 U.S. 657. It follows that the excision features of the Act did not at all—and certainly not in any substantial sense—alter previously-existing law (as interpreted in *Jencks*). On the contrary, the statute gave statutory sanction to that decision, implementing it by prescribing the mechanics for eliminating non-germane material from the papers and documents required to be made available to the defense. In short, in this respect the Act made no change, even of a procedural nature, in previously-existing law. Accordingly, no *ex post facto* question arises.

But even if it be assumed that the excision clauses of the "Jencks" Act effected a change in previously-existing law, it is clear that the change was, at most, one relating "to modes of procedure only, in which no

one can be said to have a vested right," and which, accordingly, Congress may "regulate at pleasure" (*Hopt* v. *Utah,* 110 U.S. 574, 590). Certainly, these provisions of the Act do not remotely resemble the sort of legislation against which the *ex post facto* prohibition is, characteristically, directed, *viz.*, "penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment" (*Harisiades* v. *Shaughnessy,* 342 U.S. 580, 594). And while "there may be procedural changes which operate to deny to the accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition," it is "now well settled that statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited." *Beazell* v. *Ohio,* 269 U.S. 167, 170 (statute authorizing joint trials for jointly indicted persons *held* not *ex post facto* as applied to prior crime).[54]

For further discussion, see the Government's Brief in *Rosenberg* v. *United States,* No. 451, this Term.

D. INADMISSIBLE EVIDENCE WAS NOT RECEIVED

Petitioner's final contention (Pet. Br. 64–71) is that he was prejudiced by the admission of certain al-

[54] See also *Mallett* v. *North Carolina,* 181 U.S. 589, 592–597 (statute giving state right of appeal); *Thompson* v. *Missouri,* 171 U.S. 380 (statute making admissible an important new type of evidence); *Hopt* v. *Utah, supra,* 110 U.S. 574, 590 (statute making previously incompetent class of persons competent to testify).

legedly incompetent and irrelevant evidence. Complaint is made of three principal types of evidence.

1. It is argued that it was error to admit evidence as to the nature and character of the Communist Party which was not directly linked to petitioner (Pet. Br. 64, 66–71). There is no substance to this contention.

One of the elements of the offense defined by the "membership" clause of the Smith Act—the first element to be proved—is that the group or society was, during the pertinent period, one which taught and advocated the forcible overthrow of the Government. *Knowing* membership in the group must be proved in addition, but the first step, legally and logically, must necessarily be proof of the character of the organization. The only way to prove the character of an organization is to adduce evidence of the authoritative acts, statements, and publications of its officers, leaders, and official spokesmen. To limit such proof to acts and statements of the particular individual charged with knowing membership in the organization (or done or uttered in his presence) is incorrect. If petitioner's contention that this is required were valid, the nature of the Party, a material issue, could never be proved. For the Party is by definition a group. And the group's character could not be known by examining only the acts and statements of an individual member in isolation. This argument harks back to petitioner's effort on the constitutional issue to divest "membership", as used in the Smith Act, of its essential meaning—of its denotation of concert with and adherence to others. Both contentions must

fail because they refuse to take account of the group and collective character of membership in a tightly-knit organization such as the Communist Party.

Of course, where the individual defendant in a membership case is, as here, a high-ranking officer and leader of the Party, proof of the character of the Party may (and would normally be expected to) include (as it did here, *supra*, pp. 6–23, 79–81) individual acts and statements of the defendant himself. But there is surely no merit to the argument that it must be *limited to* such individual acts and statements. As noted by the court below, "That part of the evidence which pertained to the activities of the Party with which he [petitioner] had no immediate connection was relevant, since it tended to prove the allegations of the indictment that the Communist Party of the United States was a group of persons who taught and advocated the overthrow of the Government of the United States by force and violence" (R. 481).[55]

Petitioner necessarily concedes this central point when he admits that it would be competent for the Government to prove what the Party advocates by putting in evidence "its official acts in the form of constitution, by-laws, resolutions, and other officially approved publications and declarations"—even though he may have had no personal role in their drafting (Pet. Br. 67). "If in Smith Act cases against Communist Party members," he says, "the prosecution

[55] And see, on the same point, the opinion of the court below on the former appeal. *Scales* v. *United States*, 227 F. 2d 581, 589. See also, to the same effect, *United States* v. *Lightfoot*, 228 F. 2d 861, 867 (C.A. 7), reversed on other grounds, 355 U.S. 2.

should attempt to prove *the Party's* unlawful advocacy by reference to its official pronouncements as an organization, there certainly would be no basis for objection on the ground that the defendant was not present at the time" (*ibid.;* petitioner's emphasis). This is, of course, true. But in view of the rigorously disciplined nature of the Party organization and its alertness to discover and swiftly punish any deviation from the Party line, it is clear that what the Party truly advocates and what its teachings are is better shown by what it permits and authorizes its officers and leaders, *in practice,* to teach and advocate. It would be wholly unrealistic to restrict the prosecution's proof on this subject to the Party's constitution, by-laws, and other "official" pronouncements when these very pronouncements are shown, by the testimony of the Party's own former leaders (as in the case of witness Lautner), to contain "meretricious and self-serving disclaimers," to use petitioner's phrase—or "double talk," to use Lautner's (Pet. Br. 68).[56]

Nor can petitioner escape the force of this logic by his argument that "[i]f it is secret advocacy in contravention of open Party doctrine that is the basis of the charge [that the Party advocates violent overthrow],

[56] Cf. the Second Circuit's observation in the *Dennis* case, 183 F. 2d 201, 229, affirmed on other issues, 341 U.S. 494 (holding that it was proper to permit a prosecution witness, a former Party leader, to testify that the Party's constitution contained "passages * * * which were understood by the initiate to be only a cover—'window-dressing'—for the violent methods advocated and taught"): "This was so patently competent testimony that it needs no discussion."

then it cannot be proved as against Party member A by what member B said to member C in A's absence" (Pet. Br. 69). Where, as here, the evidence clearly establishes that the defendant-member was a Party leader who was privy to such "secret advocacy" and himself engaged in it, no sound reason exists for limiting the proof of what the Party teaches to his own personal teachings and pronouncements. On the contrary, as we have pointed out, precisely because it is *group* advocacy that is in issue no such arbitrary limitation of the proof on this issue is justified, so long as the defendant is shown (as here) to be an integral and knowledgeable member of the group.

2. Petitioner also challenges (Pet. Br. 65–66) the admissibility—on the ground that they were irrelevant, inflammatory, and prejudicial—of "three documents (G. Exs. 64, 65, and 66) relating to the Korean War" (Pet. Br. 65). These documents, it is claimed, "had no conceivable bearing on the issues in the case" (*ibid.*).

The basis of petitioner's argument in regard to these documents is that any document, declaration, or utterance which does not *directly* tend to establish the character of the Communist Party as an organization which advocates the violent overthrow of the Government is not germane to any issue under the Smith Act's membership clause.[67] This premise is misconceived. As noted by the Court of Appeals, the

[67] See colloquy at R. A23 concerning petitioner's motion for a mistrial based on the admission of and reading from these exhibits.

three documents in question—which petitioner personally delivered to the witness Clontz (R. A20, 311–312; Tr. 1149–1150)—"were clearly intended to blacken the United States and stir up animosity against it and thus weaken its ability to defend itself should a revolution be attempted. [They] clearly served to corroborate the testimony in regard to Scales' activities in securing Party members and promoting the general objectives of the Party" (R. 481). Similarly, the Court of Appeals on the former appeal sustained the admissibility of documents which had as their purpose "the arousing of dissension" on the ground that they "had a direct bearing on the purpose to overthrow the government by force and violence when a favorable opportunity should present itself" (*Scales* v. *United States,* 227 F. 2d 581, 589).

That such were the Party's purposes in publishing and disseminating these documents is particularly true with respect to Government Exhibit 66, *I Saw the Truth in Korea,* whose admissibility petitioner particularly challenges (Pet. Br. 65–66). This exhibit constituted but one item of the prosecution's proof that the Party seeks unceasingly, day by day, to sow the seeds of dissension among the people in an effort to embitter them against their own Government, as part of its long-range strategy of weakening that Government in every way possible, and thus speeding the day when its forcible overthrow will become a practical possibility. To be sure, evidence of the type contained in Government Exhibit 66 would certainly not suffice, of itself, to prove that the Party advocates the forcible destruction of this Gov-

ernment. But it was admissible as tending to establish the true nature of the Party as an organization which knows that its ultimate objective of a forcible seizure of power is unattainable so long as the populace is generally content with its economic and political lot and the system of government under which it lives, and so long as there are no deep fissures in the loyalty and patriotism of the people as a whole.

Such evidence was admissible, in other words, as tending to show that the Party is no mere intellectual or visionary group parroting words of advocacy of force, without either hope of success or realistic plans for achieving its goal, but a serious *action*-organization—an organization which implements its program of ultimate violence with interim plans for preparing the groundwork for the final coup. The disputed evidence tended to reveal the Party as an organization which, by exploiting potentially divisive issues (particularly *vis-à-vis* the Communist world) with a view to stirring up hatred by the people of their own Government and by taking day-to-day steps designed to bring about a state of seething resentment against the Government, works realistically towards bringing about the necessary "objective" conditions (see *infra*, pp. 123–124, 130, 132) which it realizes must be present before any attempt at forcible seizure of power can have hope of success. Since the evidence was in that sense relevant to the nature and character of the Party as an advocate of political violence, it was admissible in the trial judge's discretion. We submit that the documents in question would have been ad-

issible even if they had been received simply as arty documents reflective of the character of the arty as such, and had not been specifically linked petitioner. In fact, as we have noted, the evidence hows that witness Clontz received each of the docuents from petitioner himself (R. A20, 311–312; Tr. 149–1150).

3. Neither was it error, as petitioner claims (Pet. r. 66), to receive in evidence "Communist Party eachings concerning a so-called 'Black Belt' of conentrated Negro population, throughout which the Negroes should be regarded as an oppressed 'nation' ith the right of self-determination." The Party's eachings on the "Negro Question," particularly with eference to the right of self-determination and the roposed establishment of a separate Negro nation n the South, were shown to be a basic part of the trategy and tactics of the proletarian revolution (R. 2–23, 164–167, 249–250, 256, 280, 315–319, 327–329, 41–343, 383–384, 414–415, 422). Petitioner himself elated the "Black Belt" and "Negro nation" conepts to the Party's program of violent revolution (*supra*, p. 9). *Foundations of Leninism* (G. Ex. 5), basic Communist "classic," and one which petiioner required Clontz to study with special care as art of his indoctrination (R. 262), explains the ethod by which the Party's program of self-deterination is to be used in facilitating the forcible verthrow of "imperialist" governments:

> Leninism has proved, and the imperialist war and the revolution in Russia have confirmed, that the national problem can be solved only in connection with and on the basis of the pro-

> letarian revolution, and that the road to victory of the revolution in the West lies through the revolutionary alliance with the liberation movement of the colonies and dependent countries against imperialism. The national problem is a part of the general problem of the proletarian revolution, a part of the problem of the dictatorship of the proletariat [pp. 78–79].

The "Black Belt" evidence was thus directly relevant to the character of the Party as an advocate of the revolutionary destruction of this Government by force.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

J. LEE RANKIN,
*Solicitor General.*
J. WALTER YEAGLEY,
*Acting Assistant Attorney General.*
KEVIN T. MARONEY,
PHILIP R. MONAHAN,
*Attorneys.*

APRIL 1959.

# APPENDIX A

## Summary of the Evidence (Not Specifically Linked to Petitioner) That the Communist Party Was During the Indictment Period an Organization Which Taught and Advocated the Forcible Overthrow of the Government of the United States as Speedily as Circumstances Would Permit

John Lautner, a prosecution witness, was one of the eading members of the Communist Party at the na-ional level prior to 1950 (R. 2; Tr. 80–81), having een, at the time of his expulsion in that year, a nember of the National Review Commission, the Party's top security body, as well as the Chairman of he New York State Review Commission (R. 3, 6; Tr. 83, 86–87, 312).

Lautner first joined the Communist Party in 1929 R. 1–2; Tr. 80–81). In 1930 he was a pupil at the Party's National Training School in New York, to-ether with some twenty other students selected from ifferent parts of the country (R. 7–8; Tr. 87–88, 03). Later, in 1941, he again attended this National Training School, together with six other students, all f whom held high Party positions (Tr. 126–128). The chool's director, Jacob Mindel, told the students hat "normally," *i.e.*, if the "world situation" were ifferent from what it was at that time, they would ave been sent to the Lenin School in Moscow, which rained "professional revolutionaries" for the Com-unist Party (R. 19–20; Tr. 130–131). From 1947 o 1949, Lautner, in turn, was a teacher at various arty schools and classes in New York (Tr. 249, 51, 269, 307–309).



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In the 1930 and 1941 national schools Lautner was taught, and in his own classes he himself taught, "that the ultimate goal, the ultimate aim of the Communist Party was to bring about a fundamental change in the economic, social and political structure of capitalism in the States" (R. 105; Tr. 426–427) and that (R. 106; Tr. 427)—

> * * * this fundamental change cannot be achieved peacefully. The United States * * * being the most powerful imperialist country, being the leader of the countries in the so-called imperialist camp, * * * this change will come and it can come as a result of force and violence on the part of wresting power from the capitalist class in this country.

In the 1941 school Stalin's *Problems of Leninism* (G. Ex. 6, Tr. 115) was assigned and the principles contained in the following passage were discussed (G. Ex. 6, pp. 19–20; R. 36–37; Tr. 174–175):

> Can such a radical transformation of the old Bourgeois system of society be achieved without a violent revolution, without the dictatorship of the Proletariat? Obviously not. To think that such a revolution can be carried out peacefully within the framework of Bourgeois democracy which is adapted to the domination of the Bourgeoisie, means one of two things. It means either madness, and the loss of normal human understanding, or else an open and gross repudiation of the Proletarian revolution.[1]

Lautner testified that these principles were taught to be "applicab[le] * * * to the United States at that time." (R. 37; Tr. 175) and that he, in turn, taught

[1] As noted *supra*, p. 15, petitioner once called this passage to witness Clontz's attention and commented on it.

em in his own Party classes in the late 1940's
id.).

*Strategy and Tactics* (G. Ex. 13, Tr. 157, 158), a
llection of excerpts from the writings of Lenin,
alin, and other authoritative Communist spokesmen,
as discussed in the 1941 school and by Lautner in
s own classes in the late 1940's (R. 26–27; Tr. 156);
nong the passages discussed was the following (G.
x. 13, p. 56; R. 30–31; Tr. 167):

> The revolutionary will accept a reform in order to use it as a means wherewith to link legal work with illegal work, in order to use it as a screen behind which his illegal activities for the revolutionary preparation of the masses for the overthrow of the Bourgeoisie may be intensified. * * * The reformist, on the other hand, will accept reforms as a pretext for renouncing all illegal work, to thwart the preparation of the masses for the revolution and to "rest in the shade" of reforms that have been "bestowed".

autner testified that George Siskind, the instructor
n Marxism-Leninism at the 1941 school and a mem-
er of the Party's National School Commission (Tr.
37), said, in reference to this quotation, that reform-
sm "had nothing in common with Marxism-
eninism" (R. 31; Tr. 168).

In both the 1930 and the 1941 schools, Lautner
as taught, and in his later classes he himself taught,
iat the fundamental change, to be accomplished by
rce and violence, would be brought about when two
ets of conditions" historically coincided (R. 57–58,
7; Tr. 260–261, 428–429). These conditions, which
Party parlance are referred to as the "objective"
d "subjective" conditions (R. 57–58, 107), were ex-
ained by Lautner as follows (R. 57–58):

> There are two sets of conditions necessary for a successful Proletarian Revolution. One set [of] conditions is objective and the other set of conditions is a subjective set of conditions. The objective set of conditions are a disruption in the smooth running, the state apparatus of capitalism, a war situation, a war, disruption in the economy of capitalists in the capitalist state, mass unemployment, wide dissatisfaction with the way things are, where the government of a capitalist state has to resort to all types of improvisations to maintain itself * * *. These are one set of conditions.
>
> Now parallel with that, if there is a strong Communist Party in that given country—not necessarily numerically strong. Numerical st ngth does not decide the strength of the Party. The influence of the Party and leadership, and the ability to exploit a situation determines the strength of [the] Communist Party; not numbers. * * * if there is a strong Communist Party that has and enjoys the influence of the decisive sections of the working class in the basic industries, in addition to that, and enjoys the confidence of other sections of the workers, if also in addition to that, enjoys the confidence of large sections of the so-called allies of the working class, like poor farmers, and in the United States the Negro people, and in addition to that, that the Communist Party is able to neutralize sections of the middle class, when those two sets of conditions exist, then the Proletarian Revolution will be successful.

At that time, in other words, the Party, "carrying out its vanguard r[o]le," will "lead the working class to wrest power from capitalism, and bring about that fundamental change in the social, political and economic structure of our society here" (R. 107).

In all the schools, Lautner testified, the instructors stressed that all Marxist-Leninist principles applied

to the United States, and they condemned so-called "American exceptionalism"—the doctrine that the United States is exempt from the basic principles of Marxism-Leninism and that there is a possibility that the "fundamental change in the economic, political and social structure could be achieved [in this country] through an evolutionary process" (R. 29–30, 33–34, 37, 56; Tr. 165–166, 171–172, 175, 259–260). Party leaders and instructors, including Lautner, also repeatedly emphasized that the day-to-day activities of the Party and each of its members must be directed toward realizing the final aims of the Party and that the efforts of every member were being constantly evaluated in this light (R. 58–59, 107–108; Tr. 262–263, 429–430).

At its national convention in 1944, the Communist Party was reorganized as the Communist Political Association (Tr. 524–525). In July 1945, however, a new national convention reconstituted the Communist Party (R. 47–48, 51; Tr. 218, 225, 232–233, 525) and devoted itself to ending the "revisionist" policies of Earl Browder, the former General Secretary of the Party, which were being attacked throughout the Party (R. 39; Tr. 180, 218–220, 535). The convention passed a resolution[2] condemning the "opportunist errors" of Browder (Tr. 538), which witness Barbara Hartle, a member of the Resolutions Committee (Tr. 532), explained as meaning "pursuing a social democrat or peaceful road to socialism * * * instead of a

[2] The resolution was published in *On the Struggle Against Revisionism* (G. Ex. 23; Tr. 228, 233, 538), which contained the basic documents of the convention and was used to reeducate Party members returning to civilian life following their army service (Tr. 537), as well as in the September 1945 issue of *Political Affairs* (G. Ex. 24; Tr. 227, 233), the Party's official theoretical organ (Tr. 209–210).

revolutionary road to socialism" (Tr. 538). Mrs. Hartle said that the term "opportunist errors" was used because it was more acceptable to the working class while having a "basic meaning of a great deal more to Marxist-Leninists" (Tr. 538).

In order to implement the new policies, the Party leaders began a revitalized training program in Marxism-Leninism, including classes for beginning, intermediate, and advanced students under the direction of the Party's National Education Commission (R. 51–52; Tr. 243). To guide instructors in these classes outlines were prepared by the Commission (R. 52; Tr. 243), including the *Outline on Fundamentals of Marxism*[3] (G. Ex. 25, Tr. 245, 247). This *Outline* consisted of nine "Lessons," each covering a specific phase or aspect of Marxism-Leninism, and each referring the student to one or more of the Marxist-Leninist "classics," or selections therefrom, as "reading assignments" or "additional reading." These reading assignments included those "classics" (and passages therefrom) which most unambiguously called for the use of force in overthrowing the governments and institutions of the "capitalist" nations. For example, Lenin, in chapter I of his *State and Revolution* (G. Ex. 16, Tr. 181, 184) (one of the study assignments for Lesson IV), chastised Kautsky for having "forgotten or glossed over" the fact that "it is clear that the liberation of the oppressed class is impossible not only without a violent revolution, *but also without the*

[3] This outline was distributed by the Party's national headquarters and was used as a guide by Lautner in classes he taught in Party schools in the late 1940's (R. 52–54; Tr. 244–246). It was also used by Mrs. Hartle in classes she taught in the Northwest District from 1948 until 1950 (R. 179; Tr. 653). In her capacity as District Educational Director, she mimeographed two hundred copies of the outline and distributed them to the sections and clubs of her District (R. 179; Tr. 654).

*destruction* of the apparatus of state power * * *" (G. Ex. 16, p. 9, emphasis in the original; read to the jury at Tr. 975). Similarly, Stalin, in chapter IV of his *Problems of Leninism* (G. Ex. 6, Tr. 112, 116) (assigned as "additional reading" for Lesson VII), ridiculed the idea that the proletariat's seizure of power could be achieved "without a violent revolution" (G. Ex. 6, p. 19; read to the jury at R. 36–37, 263; Tr. 174, 1016). "To think that such a revolution can be carried out peacefully within the framework of Bourgeois democracy," he said, "means one of two things. It means either madness, and the loss of normal human understanding, or else an open and gross repudiation of the Proletarian revolution" (G. Ex. 6, p. 20; read to the jury at R. 37, 263; Tr. 174, 1016).

Witness Cummings testified that in December 1945 he was taught, in a class on the role of the Communist Party, conducted at the Party's Midwest Regional School by George Siskind, the school's principal instructor, that "the capitalist system must be overthrown" and that "the only way" that this could be done "was by force and violence" (R. 447; Tr. 933). Siskind further stated that the Communist Party must teach the most militant workers in the shop, just as Lenin instructed the most militant workers in Russia, that "they cannot have peace with the working class without a revolution" and "that it was necessary at times to throw bombs in the machinery" (R. 447–8; Tr. 933). Siskind taught that the United States was in the last, or "imperialist," stage of capitalism and that, because of the unequal development of capitalism in different countries in this stage, World War II had resulted (R. 448–9; Tr. 935). He emphasized that the only solution to unequal development "was the overthrow of the capi-

talist governments, and he said that the only way the capitalist government would be overthrown was by force and violence" (R. 449; Tr. 935). Siskind further instructed his students that they must "hate" and "fight" the "capitalist class," and that, just as "blood ran in the streets in Russia" at the time of the Bolshevik Revolution in that country, so too, "before we would have peace with the capitalist class in America," "blood would run in the streets in America" (R. 450; Tr. 937).[4]

In April 1946, witness Barbara Hartle attended a Party National Training School (called the "Stalin-Foster" School) near New York City (Tr. 548–550). Mrs. Hartle, a full-time Party Worker from 1940 until 1952 (Tr. 809, 753), held numerous Party offices, including membership on both the District Board and the District Committee of the Northwest (Washington, Oregon, and Idaho) District (R. 120-121; Tr. 501–502), and the office of Administrative Secretary of that District (Tr. 523). The "Stalin-Foster" School was part of the Party's re-education program designed to wipe out all remnants of "revisionism"; it was attended by thirty students, all of whom were Party officers, from different parts of the country (Tr. 549–552, 554).

In a class on "The State," the instructor told the students that the United States was a "bourgeois state," which "must be forcibly overthrown by the working class led by the Communist Party" (R. 135;

[4] On recross-examination, Cummings read to the jury from a report he had made to the F.B.I., at the time he attended the classes, concerning what he had been taught, as follows (R. 454; Tr. 979): "The worker must hate the capitalist class and fight them. It will mean the spilling of blood. We will have streets of blood as they had in Russia. The workers must be organized so when this revolution comes, it must not be a failure. * * *"

Tr. 577–578). Two examples of the revolutionary seizure of a state by force and violence were cited (Tr. 581–582). The first was the "Paris Commune" of 1871 (Tr. 581). The instructor described this as (*ibid.*)—

> * * * the first attempt of the Proletariat to storm the citadels of capitalism, and it was an unsuccessful attempt, but that was described to us as the first time in the history of humanity that the working class, the Proletariat class had made an effort to gain power.

Asked if she was taught "why this effort was not successful," Mrs. Hartle replied (*ibid.*):

> Yes. We were taught * * * that the reason that * * * the Parisian Proletariat didn't retain power was because they did not take sufficient means, sufficient necessary steps, did not use sufficient force to keep that power, and we were taught one of the big mistakes that we made was that in seizing the power they overlooked taking over the banks the same time that they took over the Bastille and some other things like that.

The second example cited by the instructor was "[t]he October, 1917, Revolution in Russia" (Tr. 582).

One of the courses in the school, Mrs. Hartle testified, was on the subject of "The U.S.S.R.," taught by Max Weiss (R. 167; Tr. 639–640), a member of the Party's National Committee (Tr. 237). Weiss taught that "it is not enough in the Communist Party to discuss and study Socialist principles in the abstract, as had been done in Socialist parties and movements in the past," because "today there is a Socialist country in the world, a working class that has gained power, established the dictatorship of the Proletariat, and has exercised that dictatorship and, therefore, the Communist Party studies socialism not in the abstract but

in its concrete manifestations in the Soviet Union" (R. 168; Tr. 640–641). Describing the Bolshevik Revolution of 1917 as "a forcible seizure of power through the destruction of the existing Bourgeois state machine" (R. 171; Tr. 644), Weiss (*ibid.*)—

> * * * taught us that the task that confronted the Russian Proletariat led by the Bolsheviks was, one, the smashing of the Bourgeoisie state machine. He said that the armed forces, courts, prisons, administrative apparatus, police, had to be smashed, that one of the first things that was done was to issue a decree forming a Red Army and Navy, but that it was not possible to form this Red Army and Navy just in a day or two and that the first steps that were taken were to attach commissars from the Bolshevik Party to the old officers' staffs, that immediately Red guard units were formed, and that a workers' militia was established.

It was "possible and relatively easy for the Bolsheviks to take power in Russia," Weiss taught, "because of a number of subjective and objective conditions" (R. 139; Tr. 589). "The objective conditions were that there was a serious situation in the country as the result of the war, World War I"; the "subjective conditions" lay in the fact that "the Bolsheviks were a trained, steeled and tested party" (*ibid.*)[5]

Mrs. Hartle further testified that it was taught at the school that the Communist Party of the United States, "in preparing for the Proletarian Revolution" in this country, should "be guided by the experiences of the Bolshevik Party in Russia at the time of the Russian Revolution"; that Party members in this country "should study very seriously the History of the Communist Party of the Soviet Union, that that

[5] Compare Lautner's testimony, *supra*, pp. 123–124, concerning the "objective" and "subjective" conditions needed for a successful proletarian revolution.

was one volume which more than any other volume would give experience and guidance to the American working class" (R. 173; Tr. 646–647).[6] It was the "plan and program" of the Party, she was taught, when a "revolutionary situation" came to pass, "to lead the working class to seize power, to smash the Bourgeois state machine, establish the dictatorship of the working class or the Proletariat, and then to proceed to reorganize all industry on a Socialist basis" (R. 138–139; Tr. 588). Instructor Weiss pointed out to the class, Mrs. Hartle testified, that the Russian Bolshevik Party was only fourteen years old when it seized power in 1917, and that "if the Communist Party of the U.S.A. had used the same timetable" in this country the "dictatorship of the Proletariat would have obtained in this country in 1934" (R. 168–169; Tr. 641).

Mrs. Hartle further testified that the following passage from *A Letter to American Workers,* by Lenin (G. Ex. 17, p. 16; R. 232; Tr. 798), was taught to the students at the school:

> For the class struggle in revolutionary times has always inevitably and in every country taken on the form of civil war, and civil war is unthinkable without the worst kind of destruction, without terror * * *.

Mrs. Hartle testified that she used the notes and instructions which she received in this 1946 National Training School in various Party training schools at

[6] Lautner testified that when the *History of the Communist Party of the Soviet Union* (G. Ex. 19, Tr. 201–202, 213) was published in 1939 it was strongly recommended by Party leaders and plans for its wide distribution were made (G. Ex. 20, Tr. 206, 207; Tr. 203–207). It became part of the re-education program after the 1945 convention and was recommended in an article in the December 1949 issue of the official Party publication, *Political Affairs* (G. Ex. 21, Tr. 208, 210; Tr. 208–213).

which she taught in the Party's Northwest District from 1946 to 1950 (R. 177–178; Tr. 651–653).

Mrs. Hartle, in summarizing what she taught and was taught as a Party member from the reconstitution of the Party in 1945 until she left it in 1952 (R. 227–234; Tr. 793–801), said that the goal of the Party was the dictatorship of the proletariat, which could only be attained by forcible means (R. 230–231; Tr. 797–798); that "any theory of a peaceful road to socialism, or a growing over from capitalism to socialism was a betrayal of the working class" (R. 231; Tr. 798); and that force and violence would be used to seize control at "that moment in history * * * when both the subjective and objective conditions are ripe at the same time" (R. 233–234; Tr. 800–801).

In April 1947, witness Obadiah Jones attended a Party Training School in St. Louis, Missouri (R. 335; Tr. 1363). Jones was instructed by George Siskind, the principal instructor (R. 335; Tr. 1364), that the "way to attack capitalism was to fight for socialism, and also to take over the capitalist plant, and wipe them out" (R. 344; Tr. 1377). Siskind told his students that socialism "would be obtained through bloodshed, if necessary" (R. 347; Tr. 1381). Jones asked Siskind whether "the capitalists" would "defend themselves," to which Siskind replied, "Yes, they would definitely defend themselves, but there would be no use because there was other Communist nations that would surround the United States and come to the defense of the Communists" (R. 349; Tr. 1397–1398). At the final session of the school, Jones and the other students were required to take a pledge, dictated by Siskind (R. 352; Tr. 1401), promising to carry out the "will of the Party even though it meant to fight and to kill" (R. 353; Tr. 1402).

After the 1948 national convention, the Party began ationally to organize ten percent of its membership n an underground apparatus (R. 84–85, 91, 101–102, 21–224; Tr. 374–375, 387, 398–399, 401A, 725–728). The apparatus consisted of seven levels, each level onsisting of groups of three Party members each; ach group of three, on each level except the top and ottom levels, was connected with one higher-level roup of three and one lower-level group of three (G. Ex. 33, Tr. 379, 381; R. 87–88, 222–223; Tr. 381–83, 725–726, 736).[7] The new organizational structure was developed for security purposes, since each nember was known only to six other members (R. 88–9; Tr. 383–384; see R. 222–223; Tr. 726). To further protect the underground from detection, "calling points" for exchanging telephone messages, "drop places" for leaving written messages, and hiding places for Party leaders were chosen (R. 89–90, 224–225; Tr. 384–385, 728–729). National headquarters instructed the Districts to establish large reserve funds for use by the underground (R. 226; Tr. 730). Lautner was instructed in connection with this program to set up two sensitive short-wave radio stations, to have a printing apparatus ready for use by the underground, and to supply the names of Party members who could be trusted with from ten to twenty thousand dollars (R. 90, 95; Tr. 385–386, 391–392). Before Lautner was expelled in 1950, the Party had made considerable progress in implementing its security system in New York (R. 91–104; Tr. 387–402), including the manufacture of mimeograph machines (R. 92–94, 96–97, 100–102; Tr. 388–390, 392–393, 397–400) and the running of a security test (R. 98–99; Tr. 395–396). In the Northwest District at least part

[7] The organization was called *troika*, the Russian word for "three-system" (R. 91; Tr. 386).

of the underground apparatus was established, including a secret courier system to national headquarters complete with points of contact, passwords, and hiding places, reduction in the size of branches from about twenty-five to about fifteen members, and the organization of the branches into groups of from two to five members, with only the group leader knowing who were in the group (R. 222–224; Tr. 726–728).[8]

In the summer of 1950, witness Clontz attended the Party's Jefferson School of Social Science in New York (R. 271–274; Tr. 1031–1032, 1037–1040).[9] In addition to the regular Marxist-Leninist curriculum, Clontz received special instruction from Doxey Wilkerson in August 1950 (R. 276; Tr. 1048). Wilkerson, an instructor at the School (Tr. 313), had been elected to the Party's National Committee in 1945 (G. Ex. 23, Tr. 236; Tr. 237). In order to see Wilkerson, Clontz had to go through a strict security procedure, including the use of special passes which were destroyed by Wilkerson so that they could not be reused (R. 276–277; Tr. 1060–1061). Wilkerson told Clontz that, while some Party members had at one time hoped that the Communists' coming to power "could come about without a violent revolution" (R. 279; Tr. 1063–1064), Clontz (R. 280; Tr. 1064–1065)—

> * * * could forget all this drivel about peaceful means and that the Communist Party recognized and expressed to themselves that the only kind of means would be proper means, which would be forceful means that no longer was there any even pretense among intelligent

[8] In July 1950, witness Hartle went underground herself adopting a fictitious name, staying in her room or apartment as much as possible, and moving frequently from town to town (R. 227; Tr. 732–750).

[9] As shown above (*supra*, p. 17), the arrangements for Clontz' attending this School were made by petitioner.

> Communists that any voting system or any people's election could bring this government.

Continuing, Wilkerson told Clontz that (R. 280; Tr. 1065)—

> * * * the revolution basically would come about by combining the forces of what had been already identified as the Negro nation and the working class, with the Communist Party leading the working class as the vanguard, and that a violent revolution would be necessary to overthrow the Government.

Wilkerson further told Clontz that "the capitalists [in the United States] were speeding their death," and that "if the Korean War was converted into World War III," the "revolution would come much quicker than otherwise would be expected" (R. 289; Tr. 1076). He emphasized, however, that "we Communists did not want any martyrs" and that "the revolution should be started when the time was ripe, and not prematurely" (R. 290; Tr. 1076).

Wilkerson also told Clontz that the Party in the South had been partly underground for a long time and that plans were being made for operation on an individual basis and for secret communications from New York to the rest of the country (R. 282; Tr. 1067). Clontz was advised that, when he returned to North Carolina, he "should remain under cover," maintaining "contact with an undercover Communist club"; that in that way he "would be much more helpful to the Party when the revolution came" (R. 285-286; Tr. 1071-1072).

On one occasion Wilkerson "wrote on a piece of paper" a "formula"—"M-L—F & V"—which, he told Clontz, had been "compounded by the Appellate Courts in the land," and which, he explained, "stood for the proposition that * * * Marxist-Leninist

teachings equal force and violence" (R. 283–284; Tr. 1068–1069). Because of this, he said (R. 284; Tr. 1069)—

> * * * action had had to be taken by the National Party to conceal the fact that their principles and their goal and their aims and their doctrines included forceful and violent revolution.

As part of this concealment process, Wilkerson pointed out (*ibid.*),—

> * * * an official statement had been issued by the Education Commission of the Communist Party U.S.A. disowning or disclaiming certain study outlines, certain texts, certain publications * * *.

The order had "ordered all Communist Party members to turn those in" and "said henceforth, we will not recognize these as official Party publications" (*ibid.*). "[B]y doing that," Wilkerson explained, the Party leaders "established a technicality for Communists on trial and their attorneys" and thus made it "more difficult for Communists to be convicted" (R. 284–285; Tr. 1069–1070). This stratagem would not, on the other hand, "unduly hamper the Communist Party," Wilkerson explained, since (R. 284–285; Tr. 1070)—

> * * * in the future many things would be left unsaid that previously had been said, many things would be left unwritten that previously had been written, * * * for example, in teaching, a mere bare outline would be given, and the instructor would fill in the revolutionary part, or the students would be sent into the Marxist-Leninist works as references to find the revolution, without having it spelled out in the outline.

"[T]hat, naturally," however, Clontz was told, "would not change the basic Party goal or the basic aims of the Communist Party" (R. 285; Tr. 1070).[10]

In March 1951, witness Duran attended the National School for Mexican Cadres in Los Angeles, sponsored by the Party's National Education Commission for highly trusted Party cadres (R. 354; Tr. 1422). Alberto Moreau, one of the instructors at the School and a member of the National Education Commission (R. 357; Tr. 1428), in discussing "the Proletarian Revolution," told the students (R. 360; Tr. 1433)—

> * * * that the Proletarian Revolution would only come about if a Bolshevik rank and file, the sincere Communists, would get out and teach, and teach the people, the desirability of changing the system and the necessity of changing them, and in doing that, we had to teach the people that you cannot change the capitalist system to a Socialist system * * * the peaceful way; it had to be erupted from, and had to be taken away by force and violence * * * and the entire state machinery of the Bourgeoisie smashed, the F.B.I., the courts, and the Army and the Navy, * * * —the entire instrumentality of the Bourgeoisie had to be smashed * * *.

With respect to "the role that would be played by the Communist Party during this period of revolution when the Government would be overthrown by force and violence," Moreau told the students that (R. 361; Tr. 1435)—

[10] Wilkerson illustrated his point by referring to the fact that a certain study outline, which Wilkerson had been using in his instructions, and which Clontz was holding in his hands, was "technically * * * illegal because we Communists have disclaimed it, so that you are holding an illegal document here, actually" (R. 285; Tr. 1070).

> The role of the Communist Party * * * was to play a vanguard role, a leading role; * * * first we teach the people the desirability of overthrowing them [the capitalists] and teach them * * * it could only be done through the Proletarian Revolution, and then when the time is ripe we could stampede them against the capitalist class.

"Marxism-Leninism," Moreau told the class, was neither a "blueprint" nor a "dogma" but a "guidance for action" (R. 362; Tr. 1436). The students, he said, should take back the teachings they learned in the School and, in turn, teach them to their fellow Party members at all Party levels (R. 362–363; Tr. 1436–1437).

In the course of his teachings on the proletarian revolution, Moreau "stated to the class in a very emotional manner that he could see himself carrying a gun against the capitalist S.O.B.'s" (R. 357–358; Tr. 1429). Following the revolution, he told them, it would be important that the Party "collect * * * from the people" the "guns" with which they had been armed during the uprising in order to make sure that they "would not join a counterrevolution movement" (R. 360–361; Tr. 1434).

In September 1952, Duran attended another Party school, in Evergreen, Colorado (R. 375; Tr. 1507). This school was under the direction of Art Bary[11] (R. 375–376; Tr. 1508), the Party's District Organizer for a seven-state District in the Rocky Mountain area and the National Chairman of the Mexican Commission (R. 374; Tr. 1506). At one point in the course, Duran asked Bary whether the transition to socialism was to be "a peaceful transition" or whether "we [were] to fight a Proletarian Revolu-

[11] This individual's name is misspelled in the record as "Berry".

tion" (R. 379; Tr. 1511–1512). In the course of Bary's "explanation of violent overthrow of the Government or peaceful," he (R. 379–380; Tr. 1512–1513)—

> * * * stated that not only would it be that [*i.e.*, violent], but that we would have to set up barricades, establish a central point from where we would participate from; he stated the "we" literally speaking "we," would have to have a central point because during the revolution it may become necessary to ebb, retreat in certain battles, and we would have to learn to retreat in an organizational way and a correct way. It was essential to learn to ebb as it was to flow on the revolution.
>
> In the ebbing we were to see that we ebb before the enemy wiped everybody out. Ebbing to the central point that had been barricaded, reorganization, and then at the correct time start flowing forward in the revolution.[12]

[12] At an earlier school, held in Estes Park, Colorado, in June 951 (R. 375; Tr. 1507), Bary taught that the transition from capitalism" to "socialism" would be analogous to the turning f water in a kettle to steam, with the Communist Party proding the fire under the kettle (R. 377; Tr. 1509–1510). T]he American people," he said, "will not and cannot make successful change over from capitalism to socialism by themlves," but, "like the fire underneath the water, the Comunist Party teaches and leads them to where when the ciety reaches that nodule point, the Communist [Party] * * leads them to make that abrupt change into the society socialism" (R. 377; Tr. 1510).

## APPENDIX B

### In the United States District Court for the Middle District of North Carolina

No. 4320–G

UNITED STATES OF AMERICA

*v.*

JUNIUS IRVING SCALES

FINDING OF FACT, CONCLUSION OF LAW AND ORDER

This cause having come before the Court by virtue of a motion filed by the defendant to dismiss the indictment because of the illegal selection of the grand jury panel which returned the indictment in the above entitled cause, and the Court having considered said motion and the briefs of counsel for the defendant and for the United States of America on said motion, and having heard such evidence and legal arguments in open court on April 1, 1955, as the defendant and the United States of America desired to present, and having fully considered all the facts as well as the law involved, makes the following findings of fact:

1. That the defendant was indicted by the Grand Jury for the Middle District of North Carolina at Wilkesboro, North Carolina on November 18, 1954 and that the defendant was arrested shortly thereafter in Memphis, Tennessee.

2. That on December 7, 1954, the defendant was brought before the United States District Court, Middle District of North Carolina for the purpose

f arraignment at which time the defendant was with-
ut counsel and declined an offer of the Court to
ppoint counsel.

3. That the defendant was again brought before
he District Court on December 16, 1954, at which
ime the Court appointed counsel to represent the
efendant for the sole purpose of arraignment and
pon his arraignment the defendant pleaded not
uilty.

4. That before the defendant was arraigned the
ourt entered an order that the plea to the charge
n the indictment by the defendant would not con-
itute, on the part of the defendant, a waiver to his
ght to file pre-trial motions in this case before the
th of January, 1955.

5. That upon the request of counsel and acquiesced
n by the defendant, the time for filing pre-trial mo-
ons was extended from the 5th of January to the
th of January, 1955.

6. That the defendant failed to file any pre-trial
otions by the 14th of January, 1955. However, on
is date the defendant appeared in Court with coun-
l, Mr. Ruben Terris, who, after requesting 60 days
xtension to file pre-trial motions and a discussion
garding such extension was granted until the 18th
February, 1955, to file any and all pre-trial
otions.

7. That the Court set the 2nd of March, 1955, as
e date by which replies by the Government to all
e-trial motions must be made and the 8th of March,
55, for the date of hearing on such motions. The
urt at that time also set the 11th of April, 1955,
r the trial.

8. That pre-trial motions were filed by Mr. David
ein, counsel for the defendant on the 18th of Feb-

ruary, 1955: That the Government filed its anwers on or before the 2nd of March, 1955.

9. That on the 8th of March, 1955, 23 days after the deadline set for filing pre-trial motions, counsel for the defendant indicated for the first time he might desire to file a motion attacking the grand jury.

10. That the defendant was granted at his first request 29 days from the date of arraignment for filing motions; That he was later granted 35 days more; and that he was granted a total of 65 days from the date of his arraignment in which to file pre-trial motions.

11. That the defendant did not file his motion attacking the grand jury until 24 days after the deadline of the 18th of February, 1955, had expired and 88 days after the date of the arraignment, which was the 16th of December, 1954.

12. That the information necessary to support defendant's motion attacking the grand jury was available to the defendant and/or his counsel at the time of his indictment and had been available at all times within the period set by the Court for the filing pre-trial motions.

13. That there was no attempt by the defendant or his counsel to show cause or excuse for the delay in filing the motion attacking the grand jury.

14. That the Clerk of the District Court and the Jury Commissioners of this District would jointly send out to reputable citizens (sponsors) of knowledge and character who knew the people in their community, several different types of form letters requesting each of these sponsors to furnish a list of names of individuals suitable for jury service.

15. That the various form letters would request that the sponsors would furnish on their lists, names of

women, negroes, freeholders and persons affiliated with both the Democratic and Republican Parties.

16. That the word "Freeholder" as set forth in one of the exhibits was by no means a restriction, but was simply the designation of another source to be tapped for the names of prospective jurors.

17. That there was no intimation of any discrimination in favor of or against any particular class, by reason of political or religious faith, or race, color, or sex, or any other classification.

18. That the evidence failed to disclose any delegation of duty by the Clerk of the District Court or by the Jury Commissioner in selection of prospective jurors for service.

19. That the Clerk and Jury Commissioner exercised reasonable screening of the prospective jurors in that the Clerk and Jury Commissioner examined the names and reasonably measured each prospective juror against the statutory requirements.

20. That examination of the prospective jurors was also made by the Clerk and Jury Commissioner by availing themselves of the judgment of persons who were familiar with the prospective jurors and the areas from which they were drawn.

21. That the method used in the selection of Grand Juries was substantially the same for all the divisions of this District except that the prospective jurors for each division reside in that division.

22. That the Clerk of the District Court and the Jury Commissioner supervised and directed the selection of all names of prospective jurors, including those names inserted into the jury box for the Wilkesboro Division of this Court.

23. That there is a new jury box for each division made every five years; in years evenly divisable [*sic*] by five.

24. That the Clerk of the District Court or his deputy and the Jury Commissioner for each respective division when filling the jury box for that division, would insert into the jury box the names of prospective jurors alternately and one name at a time until the jury box contained the number of names required by the Court's Order.

25. That when the Clerk of the District Court and the Jury Commissioner inserted names into the jury box, they did so without any regard to the race, creed, color, sex or political affiliation of such person.

26. That in making up the jury box for each division there was no attempt on the part of the Clerk of the Court or the Jury Commissioner to systematically or intentionally exclude any class or group of persons from the jury box.

27. That from the names in the jury box prospective jurors were drawn and summoned for jury service. That on the reverse side of the summons was a questionnaire asking various questions regarding the name, address, occupation, citizenship, prior jury service, prior convictions, which the prospective jurors were to fill out and return to the Clerk.

28. That, although many questionnaires were not completely answered, the Clerk of the Court or his deputy would examine the answers on each questionnaire.

29. That from the group of prospective jurors summoned nineteen were drawn by a child of tender years to serve as the Grand Jury. That the remaining prospective jurors would form the petit jury panel.

That upon the foregoing facts it is concluded as a matter of law that the motion of defendant to dismiss the indictment in this case because the grand jury was illegally selected was not timely filed. It is further concluded that the evidence did not show any prejudi-

cial defects that would result in a denial to the defendant of any of his rights and that there was not any serious or substantial departure or deviation from the statutory requirements.

Of course, passing on the merits is not necessary because the motion has been rejected for its tardiness, however, the Court feels that, if there is any error in refusing the motion on the time element, it is proper to, and the Court should, pass upon the merits.

The Court denies this motion.

(S) ALBERT V. BRYAN,
*United States District Judge.*

GREENSBORO, N.C., *April 15, 1955.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 1

JUNIUS IRVING SCALES,
*Petitioner,*

*v.*

UNITED STATES OF AMERICA.

## REPLY BRIEF FOR PETITIONER

TAYLOR, SCOLL & SIMON
400 Madison Avenue
New York 17, New York

SMITH, MOORE, SMITH, SCHELL & HUNTER
Jefferson Standard Building
Greensboro, North Carolina
*Attorneys for Appellant*

TELFORD TAYLOR,
MCNEILL SMITH,
*Of Counsel.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

JUNIUS IRVING SCALES,
*Petitioner,*
*v.*
UNITED STATES OF AMERICA.

No. 488

## REPLY BRIEF FOR PETITIONER

The Government's brief does not depart significantly from the arguments put forth in its briefs when this case was last here. The new issues, arising chiefly from the evidence introduced at petitioner's second trial and this Court's opinion in *Yates* v. *United States,* 354 U. S. 298, are met chiefly by an effort to sweep them under the rug. Accordingly, only a few matters call for reply.

I. *Unconstitutionality of the Membership Clause on Its Face.* Understandably troubled[1] by Justice Brandeis' opinion in *Whitney* v. *California,* 274 U. S. 357, the Government essays a distinction which does not bear analysis. Since the California statute punished membership and Justice Brandeis concurred in affirming the conviction, it is argued (Govt. Br. 54-55) that the "implications" of the opinion are that a statute denouncing membership as a crime is not void on its face. But the concurrence was expressly rested (274 U. S. at 379-80) on the circumstance that there was evidence linking Mrs. Whitney with "a conspiracy . . . to commit present serious crimes", as well as on her failure to raise the "clear and present danger"

[1] In *Dennis* v. *United States,* 341 U. S. 494, the Court remarked (at 507) that its opinions subsequent to the *Whitney* case "have inclined toward the Holmes-Brandeis rationale" rather than to the views of the majority.

issue in the state courts. Not only the "implications" but the explicit language of the opinion make it clear that Justices Brandeis and Holmes would have found the membership charge constitutionally defective had the question been ripe for decision.[2]

Faced with the constitutional obstacles reflected in this opinion and raised by the absence from the membership clause of those factors (such as conspiratorial incitement to violence) relied on in the *Dennis* case to sustain the other provisions of the Smith Act, the Government once again seeks to salvage the clause by extensive judicial amendment.[3] This technique consists here of selecting adjectives from comments about the Communist Party, and reading them into the clause. Doctored by these proposed qualifications[4] (Govt. Br. 48-49, 52-53, and 56), the clause would read as follows (added words in italics):

> ". . . or becomes or is a*n active, purposive, rigidly disciplined, high-level* member of, or affiliates with, any *tightly disciplined, quasi-military, deeply conspirational* such society, group, or assembly of persons, knowing the purposes thereof . . ."

---

[2]See the *Whitney* case at pp. 372-73 and 379 (Pet. Br. 30).

[3]Toward the theory adopted below—that membership is the same as conspiracy—the Government's attitude is cautiously benevolent (Govt. Br. 53-54). Support is sought from Justice Jackson's concurring opinion in *American Communications Ass'n* v. *Douds*, 339 U. S. 382, 422 *et seq.* But it is clear that, in the passages from his opinion in the *Douds* case upon which the Government relies, Justice Jackson was expressing his opinion about Communist Party membership in general, and as a basis for regulatory action, rather than a postulate for application to individuals. Indeed, he supported his opinion upholding a portion of the "non-Communist affidavit" provision reviewed in the *Douds* case by pointing out that that statute does not do precisely what the membership clause does do (339 U. S. at 434): "But it is important to note what this Act does not do. The Act does not suppress or outlaw the Communist Party, nor prohibit it or its members from engaging in any above board activity normal in Party struggles under our political system . . . *No individual is forbidden to be or become* a philosophical Communist or *a full fledged member of the Party*" (emphasis supplied).

[4]From these is omitted the requirement of "intent" (Pet. Br. 25 note 30), which also is not specified in the membership clause.

This method of statutory interpretation—once described by Chief Justice Taft as making of the statute "a nose of wax"[5]—is especially attractive because it eliminates the unpleasant and awkward task, which this Court has hitherto been obliged to undertake, of weighing the constitutionality of statutes as they are written.[6] In the face of such a surrealist approach to words, it is perhaps idle to inquire whether the spare language of the statute could possibly have been intended to support so rich a gloss. Were such an inquiry deemed pertinent, the presence of the words "or

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[5] *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, 518:

> "We fully concede that it is the duty of a court, in considering the validity of an act, to give it such reasonable construction as can be reached to bring it within the fundamental law. But it is very clear that amendment may not be substituted for construction, and that a court may not exercise legislative functions to save the law from conflict with constitutional limitation.
>
> "One of the strongest reasons for not making this law a nose of wax to be changed from that which the plain language imports, is the fact that it is a highly penal statute . . . If we change it to meet the needs suggested . . . we are creating by construction a vague requirement, and one objectionable in a criminal statute . . ."

See also *United States* v. *Reese*, 92 U. S. 214, 221; *Trade Mark Cases*, 100 U. S. 82, 98; *Butts* v. *Merchants and Miners Transportation Co.*, 230 U. S. 126.

[6] The Government's error arises, of course, from confusing what might be proved about a particular individual or organization—the Communist Party was not the only organization that Congress had in mind when it enacted the Smith Act, as the Government's brief (p. 39) concedes—with what can reasonably be drawn from the language of the statute and the indictment. When not preoccupied with vexing problems of constitutionality, the Solicitor General states the elements of the membership clause (saving perhaps the questionable addition of intent) with substantial accuracy (Govt. Br. 77 note 33):

> ". . . in a 'membership' case, it suffices to prove that *the Party* (as such, and not necessarily including the defendant) engaged in the forbidden advocacy *and* that the defendant was a member of the Party with the necessary knowledge and intent" (emphasis in original text).

affiliates with"[7] seem to make it clear that "membership" was not intended to be so restricted and qualified a concept as the Government now purports to embrace.

II. *Unconstitutionality of the Membership Clause as Applied in this Case.* It is difficult to be patient with the Government's treatment of the constitutional issues presented by the trial court's admission into evidence, as proof of unlawful incitement, of the three documents relating to the Korean War (Pet. Br. 33-39). By quoting in the text of its brief (p. 62) a remark by the trial judge during a colloquy at the bench *prior* to his ruling on the admissibility of the group of documents offered by the prosecution for this purpose, and relegating to a footnote (note 25) the fact that three of the documents (those now in question) were subsequently received in evidence, the Government evades discussion[8] of the First Amendment's bearing on the situation, and of the constitutional consequences, fatal to the validity of petitioner's conviction, that flow from *De Jonge* v. *Oregon*, 299 U. S. 353, as applied to these circumstances.

It is indisputable (Pet. Br. 34-36) that the prosecuting attorneys offered these documents as specific proof of action-inciting advocacy. In connection with the First Amendment, the Government's brief disclaims (p. 61) what was said in its behalf at the trial,[9] but at a later point (pp.

---

[7]Perhaps because of constitutional doubts, these words have not, so far as petitioner is aware, been relied on in prosecutions under the membership clause.

[8]By dint of this maneuver, the "Korean War documents" are discussed only at the end of the Government's brief (pp. 116-19), in the context of the due process clause, not of the First Amendment.

[9]The Solicitor General says (Govt. Br. 61) that "one" of the "four" prosecutors made the argument so repudiated, but as the record plainly shows (R. A11-A13 and Tr. 1143), both Mr. Gavin and Mr. Woerheide, the two attorneys who conducted the bulk of the prosecution, took the position that these documents constituted proof of unlawful incitement to action.

117-18) it adopts the same position by arguing that Party literature which "sows dissension" shows "that the Party is no mere intellectual or visionary group . . . but a serious *action*-organization." The prosecution, in summation, urged the jury to treat these documents as proof of the necessary element of incitement (R. A24), and successfully opposed the defense request to charge the jury[10] that such evidence is not alone sufficient to support a verdict of guilty (R. A33-A34), although the Government now concedes (Govt. Br. 117) that it "would certainly not suffice, of itself, to prove" unlawful advocacy.

Although the trial judge, at the prosecution's request, charged the jury (R. A41) that they could not find the defendant guilty unless they found him to be an "active" member of the Party,[11] the Government has now reverted (Govt. Br. 64-68) to the position previously taken by the Solicitor General[12] that "activity" is a finding for the court, not the jury, "in the same manner that a finding of the existence of 'clear and present danger' is one which is properly made by the court rather than by the jury", citing the *Dennis* case, 341 U. S. at 511-15. But the degree of an accused's individual "activity" in a group cannot be made an "external constitutional limitation" on the application of the Smith Act, analogous to the "clear and present danger" standard.

The "clear and present danger" doctrine is not peculiar to the Smith Act. It is a principle of limitation upon the general language of the First Amendment, and that Amendment, so limited, applies to any statute which impinges on

[10]The Government's suggestion (Govt. Br. 63) that other portions of the charge covered this point is unsupported by reference to any specific language, and is utterly without basis.

[11]The petitioner (Pet. Br. 41) made timely objection, prior to trial, to the absence of this allegation from the indictment, if "activity" were to be treated as an essential element of the offense.

[12]*Scales* v. *United States*, No. 3, October Term, 1957, Supplemental Memorandum for the United States on Reargument (pp. 3-5).

matters to which the Amendment relates. As applied to political advocacy, the test (as rephrased by Judge Learned Hand and approved by this Court in *Dennis* v. *United States*, 341 U. S. 494, 510) requires a judicial determination of a mixed question of fact and public policy.[13]

But the degree of petitioner's "activity" as a member of the Communist Party presents only an issue of fact about his individual conduct. It is not a general principle of Constitutional breadth; its determination would not require a judgment on matters of law or policy. If "activity" were to be made an issue in Smith Act proceedings, it would necessarily be one for jury determination, just as is the issue whether the advocacy in which a defendant is involved is of an "action-inciting" type.

Assuming the validity of the Government's contention, however, the consequence would be that petitioner's conviction must be reversed, inasmuch as the finding of "activity" was explicitly submitted by the court to the jury and, therefore, was not and could not have been made by the judge. This result reduces the entire argument about "activity" to absurdity,[14] and points to the pitfalls attendant upon reading into the statute words which Congress did not put there, and which cannot reasonably be implied from the legislative context, purpose, or background.

III. *Failure of the Indictment to State an Offense under the Laws of the United States.* The Government's response

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[13]See *United States* v. *Dennis*, 183 F. 2d 201, 215-16. It may be noted that, in other contexts, even questions of this broad and public type are sometimes left to juries. Cf. *Mitchell* v. *Harmony*, 13 How. 115, holding that the military seizure of private property is justified only where a jury has found that there was "immediate and impending danger" of its capture by the enemy, or "urgent necessity for the public service, such as will not admit of delay."

[14]The intricacies of the Government's position can perhaps be better understood in the light of *United States* v. *Noto*, pending here on petition for certiorari (No. 564 Misc.), which was tried before the Solicitor General espoused the "activity" limitation, and where no such instruction to the jury was given.

(Govt. Br. 68-74) to petitioner's argument that this prosecution is barred by Section 4(f) of the Internal Security Act, depends upon the following propositions:

(a) The purpose of Section 4(f) is to ensure that the membership clause of the Smith Act, which expressly requires knowledge as an element of the offense, will not be construed to punish membership without knowledge (Govt. Br. 73-74).

(b) Section 4(f) should be construed in such a way that the phrase "of any other criminal statute" has no limiting or other meaningful effect on any other statutory provision (Govt. Br. 73).[15]

(c) Section 4(f) should be construed in such a way that all Communists can avoid, by pleading self-incrimination, compliance with the registration provisions of the Internal Security Act, except Communist Party members (and officers!) who are inactive, who do not know the unlawful purposes of the Party as found by Congress,[16] and who have no intention of carrying those purposes into effect (Govt. Br. 68-74, which contains not a word in reply to petitioner's argument in its brief, pp. 50[redacted] pointing out that such is the inevitable consequence of the Government's position).

When such arguments are put forward by skilled lawyers, it is a fair inference that there are no better ones. Once again, inconsistencies are the natural result. Elsewhere (Govt. Br. 85) the Government contends that, if a

[15]The Government's remark (Govt. Br. 72) that if the membership clause "did not cover Communists, it would be unlikely to cover anybody" is apparently frivolous, since earlier in its brief (p. 39) it points out that the Smith Act is also directed against Nazi and Facist movements.

[16]See 50 U. S. C. 781 (15), specifically referring to Communist "indoctrination" for the violent ends specified in the other paragraphs of this section.

Party member is a "leader", that "is in itself [per se?] strong evidence" of knowledge and intent. But Section 4(f) also covers "the holding of office", and officers are certainly likely to be "leaders". Adopting the Government's evidentiary conclusion, therefore, it is plain that Section 4(f) was indeed intended to apply to Party members who, as officers, are likely to have the requisite knowledge.

Throughout the Government's discussion of this issue runs the assumption that Congress could not possibly have intended in 1950 to exclude Communists from the scope of the membership clause, because it was against Communists that the Internal Security Act was primarily directed. This overlooks that there are various legislative methods of dealing with Communism in its relation to internal security. In the Internal Security Act, Congress utilized the method of registration, and Section 4(f) manifests a conclusion that the constitutionality (under the Fifth Amendment) of the registration provisions is more important than prosecution under the membership clause, particularly since the advocacy and organizing provisions of the Smith Act, under which prosecutions of Communists have usually been conducted, remain undisturbed by Section 4(f).

IV. *Insufficiency of the Evidence.* For all the many pages (Govt. Br. 75-88, 121-39) that the Government's brief devotes to the evidence concerning the Communist Party, there is no statement of what specific evidence, present here but not in the *Yates* case, is relied upon[17] to justify a departure here from this Court's conclusion (354 U. S. at 329) that the evidence in the *Yates* case was insufficient to establish that the Party advocates forcible over-

[17]The closest the Government comes to this vital point is its assertion (Govt. Br. 78 note 34) that there were seven prosecution witnesses at petitioner's second trial who did not testify in the *Yates* case. But, of course, it is not the identity of the witnesses—whether new or old—but the content of their testimony that is significant for present purposes.

throw "in the sense of a call to action at some future time."

From the general tenor of its brief, however, it is apparent (Govt. Br. 78-85 and 126-39) that the Government relies principally upon statements attributed to Communist functionaries at "Party schools" in Colorado, California, St. Louis, Chicago and New York. The themes and subjects stressed by the Government are the elimination of "revisionism" and "reformism", indoctrination in the "Marxist-Leninist" view that ultimately violence will be necessary to establish Communism, the establishment of Party "cadres", the historical object lessons of the Paris Commune of 1871 and the Russian Revolution in 1917, and the role of Communists as "professional revolutionaries" who must stand ready for action at an opportune time in the future.

Some of the Communist speakers are said to have used lurid expressions in expounding these doctrines, but the fact remains that they are all doctrines, entirely lacking in any present "call to action".[18] Furthermore, every one of these themes and subjects was dealt with in much the same way in the testimony of the prosecution witnesses in the *Yates* case (R. A26-A31, especially items A8, A11, A12, A16, A20, A22, A24, B2, B4, B5, C1; D1 and D3).

None of these "school" statements relied on by the Government was made in the presence of the petitioner and, for reasons already set forth (Pet. Br. 39-41 and 56-71), they cannot, with due regard for the First and Fifth Amendments, be made binding on him. As in the *Yates* case (354 U. S. at 329-30), the statements antedate the limitations period, some by a number of years. If more numerous than the similar statements in the *Yates* case, the Government's proof is still the same "sporadic showing" that was held insufficient there.

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[18] *Cf* the testimony (R. A5-A7) of one of the principal prosecution witnesses when asked on cross examination to list her *activities* as a Communist.

So far as concerns the evidence of petitioner's personal knowledge and intent, the record is not significantly different from that in the first trial. The Government perforce ignores this Court's intervening decisions in *Nowak* v. *United States*, 356 U. S. 660, and *Maisenberg* v. *United States*, 356 U. S. 670, in which expressions comparable to those attributed to the petitioner were characterized as "abstract predictory opinions", which fail to show "advocacy of action".

V. *Prejudicial Errors in the Admission of Evidence.* The Government makes no real effort to justify the admission of extensive evidence which was remote, irrelevant and prejudicial (Pet. Br. 69-71). It is argued (Govt. Br. 116) that, since the petitioner was a "Party leader", he was, therefore, "privy" to "secret advocacy", whether he was present or not, because he was an "integral and knowledgeable member of the group". It must be inferred that petitioner obtained this "knowledgeable" status at a remarkably tender age, if such a theory is deemed to justify the reception of testimony about events which allegedly transpired in New York and Seattle in 1930 (R. 7-16 and 149-50; Tr. 87-105 and 604-05).

April 23, 1959

TAYLOR, SCOLL & SIMON
400 Madison Avenue
New York 17, New York

SMITH, MOORE, SMITH, SCHELL & HUNTER
Jefferson Standard Building
Greensboro, North Carolina
*Attorneys for Appellant*

TELFORD TAYLOR,
MCNEILL SMITH,
*Of Counsel.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

No. 71

JUNIUS IRVING SCALES,
*Petitioner,*

v.

UNITED STATES OF AMERICA.

## PETITIONER'S SUPPLEMENTAL BRIEF ON REARGUMENT

TAYLOR, SCOLL & SIMON,
400 Madison Avenue
New York 17, New York

SMITH, MOORE, SMITH, SCHELL
& HUNTER
Jefferson Standard Building
Greensboro, North Carolina
*Attorneys for Appellant*

TELFORD TAYLOR,
McNEILL SMITH,
*Of Counsel.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

JUNIUS IRVING SCALES,
*Petitioner,*
*v.*
UNITED STATES OF AMERICA.

No. 8

## PETITIONER'S SUPPLEMENTAL BRIEF ON REARGUMENT

By its order entered at the previous term on June 29, 1959, the Court has set this case for reargument, specifying certain questions to which, "among others," counsel are requested to address themselves.[1] The questions so specified have all been discussed, some *in extenso,* in the briefs previously filed and on argument, and the order does not request additional briefs. Nevertheless, in view of the precise and comprehensive statement of the questions listed in the order, and of the double ration of time allotted for argument, it is apparent that supplemental briefs are appropriate if not mandatory.

In the belief that the Court may be assisted by a pointed and particularized response to the order, petitioner has not undertaken a complete re-presentation of its case. Such an attempt would necessarily involve the repetition of numerous circumstances and arguments which have already been set forth as fully and clearly as counsel's talents permit, and might submerge the points which, according to the order and

[1]The order of June 29, 1959 is set forth in Appendix A, *infra* pp. 1a-2a.

the questions from the bench on argument, are now of special interest to the Court. Accordingly, petitioner continues to rely on the brief and reply brief submitted at the last term.[2]

The issues specified in the order are those which reach the validity of the indictment,[3] rather than the sufficiency of the evidence or the conduct of the trial. Petitioner believes and earnestly contends that the indictment is invalid and should be dismissed,[4] and the Court's order is itself a sufficient indication that the constitutional and statutory difficulties which the indictment presents are serious.

However, if a majority of the Court should not be persuaded that the indictment should be dismissed on one or more of the grounds covered by the Court's order, disposition of the case will turn on other issues presented in the petition. The Court's order, listing certain questions "among others" for reargument, certainly does not limit reargument to the questions listed. The nature of the evidence and the conduct of the trial raise grave constitutional issues under the First and Fifth Amendments. Accordingly, this brief is directed in part to these other issues (with particular reference to certain questions from the bench), as well as to those listed in the Court's order.

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[2]Petitioner's previous briefs will be cited herein as "Pet. Br." and "Pet. Rep. Br.", and the Government's brief as "Govt. Br." The printed record is cited as "R.", the trial transcript as "Tr.", and the Government's exhibits as "G. Ex."

[3]Except that the list does not include the issue concerning the impanelling of the grand jury, which also would go to the validity of the indictment. On this point, petitioner rests on the previous brief. Pet. Br. pp. 59-61.

[4]*Infra*, p. 46.

## I. INTERPRETATION OF THE MEMBERSHIP CLAUSE.

The only reason that this case presents problems of construction of the Smith Act's membership clause[5] is that the government cannot defend its constitutionality as it is written. Therefore the government has (a) included in the indictment (R. A2) a charge of specific intent, not found in the statutory language, (b) suggested[6] that an additional requirement of "activity," not found in the statutory language, be imported as either an element of the offense or a "controlling constitutional standard," and (c) based its defense of the clause's constitutionality on other inferred qualifying adjectives ("high-level" member, "deeply conspiratorial" group, etc.)[7] not found in the statutory language.

The constitutionality of the membership clause untouched by judicial amendment is posed by the first question in the Court's order. The second and third questions ask whether the clause may "permissibly" be construed so as to add the requirements of specific intent or "activity" or both, and whether the clause would be constitutional if amended in either or both of these ways. The constitutional questions, petitioner believes, can best be re-examined after analysis of the statutory amendments which the government has moved.

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[5]The Smith Act and other pertinent statutory provisions are set out in the Appendix to petitioner's previous brief. Pet. Br. pp. 1a-9a. As a matter of convenience, the Smith Act and part of Section 4 of the Internal Security Act are reprinted in Appendix B, *infra*, pp. 3a-5a.

[6]Govt. Br. pp. 48, 51-52, and 64-68; Supplemental Memorandum for the United States on Reargument in Nos. 3 and 4, October Term 1957.

[7]Pet. Reply Br. pp. 2-4; Govt. Br. pp. 48-49, 52-53, and 56.

## A. The Policy of Narrow Construction to Avoid Constitutional Issues

Most rules of statutory construction are tools for ascertaining the particular meaning of a provision by reference to its language, standing alone or in the setting of the whole statute, or, when the language does not suffice, by reference to other indicia of legislative intent, usually described as "legislative history." Whether literal or historical, these are tools for determining the *meaning*, intended or expressed, of a legislative act.

The concept of narrow construction to avoid constitutional issues is not such a tool for the discovery of meaning. Rather it is an acknowledgment that the intended or expressed meaning may, in the judicial application thereof, be altered by the extraneous pressure of constitutional factors. Essentially, therefore, this is not at all a principle of statutory construction. Rather it is a judicial policy of utilizing the permissible range (if any) of statutory interpretation in order to eliminate or alleviate constitutional difficulties.

By its very nature, the "permissible range" of statutory interpretation defies reduction to a precise judicial formula, for its metes and bounds are approached only as the individual judicial mind senses the danger of pedantic literalism or of anarchic liberalism. So, too, the range may vary as the constitutional pressure is high or low. If the difficulty is not serious, there is the less reason to approach the far end of the range; if grave, the reaction may either be to stretch the range to the uttermost, or settle back to a normal construction and face the constitutional issue.[8] In

[8]The gamut of judicial reaction may be seen in *Peters* v. *Hobby*, 349 U. S. 331 and *Greene* v. *McElroy*, 360 U. S. , 79 S. Ct. 1400. In both cases a majority of the Court, acknowledging the neighborhood of serious constitutional issues, found an avoiding

short, the "permissible range" of statutory language and the scope of general constitutional provisions (such as "due process") are both controversial imponderables, and the balance between imponderables inevitably teeters.

For all that it involves these imponderables, however, the policy of narrow construction to avoid constitutional issues is not wholly amorphous. If the cases in which the Court has applied or refused to apply the policy do not make a logical pattern, they nonetheless offer guidance in the present case.

Certain much-cited decisions may be laid to one side as inapplicable. This is not a case where the literal language of the statute (or regulation) raises no problem, and it is the government's effort to *expand* the language by inference which causes the difficulty.[9] Here it is the literal language which initially precipitates the constitutional difficulty, and the government seeks to infer additional words not to broaden the statute, but to narrow it in the hope of saving it.

Nor is this a case where there is a palpable ambiguity in the statute—a hiatus of meaning which neither the words nor the legislative history can close. That is the classic situation in which the policy of narrow construction has won general acceptance—where the language "will bear

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narrow construction within the "permissible range." In the *Peters* case, two Justices thought the narrow construction lay *beyond* the permissible range regardless of the constitutional implications, on which they made no comment. In the *Greene* case two Justices thought the narrow construction lay *within* the permissible range regardless of the constitutional implications, on which they made no comment. In the *Peters* case one Justice thought the narrow construction lay beyond the permissible range and that the statute in question was being unconstitutionally applied. In the *Greene* case one Justice thought the narrow construction lay beyond the permissible range, but that the broader construction raised no substantial constitutional issue.

[9] Such was the situation in the *Peters* and *Greene* cases, *supra* note 8. *Cf. Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, 29-32.

two interpretations," both of which are "equally obvious."[10] Nor is it a case where a statute is invoked in an absurdly inappropriate situation, which the legislators could not possibly have intended to embrace.[11]

Still another group of cases that are not of much help here are those where the narrow construction involves a single word of indeterminate scope. Such problems have arisen under the "commodities clause" of the Interstate Commerce Act (whether an "interest" in a commodity includes ownership of stock in the corporation owning the commodity),[12] the Corrupt Practices Act ("expenditure"),[13] and the House Resolution establishing the Buchanan Committee (whether "lobbying" embraces the public distribution of books and pamphlets).[14] These decisions have been controversial because the narrow construction urged in aid of constitutionality has seemed, to some, to frustrate or unduly limit the scope of Congressional regulatory policy. When the statute is penal and civil rights and liberties are involved, the obvious wisdom and fairness of a rigorous construction of imprecise or many-faceted words have generally and recently commended themselves to the Court. Thus the Taft-Hartley Act concept of "belief" in violent overthrow was interpreted as meaning a belief in that goal "as an objective, not merely a prophecy." *Communications*

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[10] *Knights Templars' Indemnity Co.* v. *Jarman*, 187 U. S. 197, 205.

[11] In *United States* v. *Kirby*, 7 Wall. 482, a mail-carrier was arrested under an indictment for murder, and those who arrested him were then indicted for obstructing the mails. Declaring that the legislature always intends such exceptions as are necessary to avoid absurd consequences, Mr. Justice Field cited Plowden's case of the prisoner who fled from a jail that was on fire, and was acquitted of jail-breaking "for W is not to be hanged because he would not stay to be burnt."

[12] *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366.

[13] *United States* v. *C. I. O.*, 335 U. S. 106 (narrow construction held within the permissible range); *United States* v. *Auto. Workers*, 352 U. S. 567 (narrow construction held beyond the permissible range).

[14] *United States* v. *Rumely*, 345 U. S. 41.

*Assn* v. *Douds*, 339 U. S. 382, 407. In the Smith Act itself, the words "advocate" and "organize" have been restrictively construed in *Dennis* v. *United States*, 341 U. S. 494, and *Yates* v. *United States*, 354 U. S. 298.

Closely akin to these cases are those in which the Court, to avoid constitutional doubts, has construed the word "wilfully" as requiring not merely the common law *mens rea*, but a specific intent to bring about the evil against which the statute is directed. *Hartzel* v. *United States*, 322 U. S. 680; *Dennis* v. *United States*, *supra*; *cf. Screws* v. *United States*, 325 U. S. 91. In all these cases, the Court was sharply divided on the constitutional or evidentiary *effect* of the proposed construction, rather than on the permissibility of the construction itself.

But these cases, hinging as they do on the construction of a word in the statute, do not govern the present situation.[15] The membership clause does not contain the word "wilfully," and there is no other word in the clause that can be construed to require specific intent.[16]

Much closer to the mark are the numerous cases where a federal penal or regulatory statute is cast in general, all-inclusive terms which over-lap areas within the powers vested in Congress by the Constitution and areas within the powers left to the States or expressly banned by the Constitution. Under such circumstances, may the statute be limited to the reach of Congressional power, even though there is no warrant for such a limitation in the words of the statute?

One of the earliest such cases involved the application within Louisiana of a statute directing the federal courts

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[15]The *Dennis* and *Screws* cases, *supra*, are discussed in their bearing on the specific intent issue, *infra*, pp. 14-17.

[16]The government may perhaps argue that "activity" can be derived from the word "member", but its last-taken position (Govt. Br. pp. 64-68) is to the contrary, and that "activity" is a "constitutional standard" but not an element of the offense. This point is discussed *infra*, pp. 18-19.

to follow state court practice. A Louisiana statute provided for appellate review in a manner which perhaps conflicted with the Seventh Amendment's guarantee of jury trial in suits at common law. In *Parsons* v. *Bedford*, 3 Pet. 433 (1830) the Court speaking through Mr. Justice Story, held that the general language of the federal statute might be subjected to an implied limitation so as to preclude federal judges from re-examining jury-found facts, and thus avoid constitutional doubts.[17]

Since the *Parsons* case, there have been two or three others in which the Court, to avoid constitutional doubts, has laid a drastic and unexpressed limitation on the general words of a statute.[18] Perhaps the most recent example of this sort of thing is *Crowell* v. *Benson*, 285 U. S. 22, where the Court read into the Longshoremen's and Harbor Workers' Compensation Act[19] a limitation excluding "jurisdictional facts" from the sphere of administrative finality. Mr. Justice Brandeis (with Justices Stone and Roberts) dissented, on the ground that (285 U. S. at 76-77): "The court may not, in order to avoid holding a statute unconstitutional, engraft upon it an exception or other provision . . . . Neither may it do so to avoid having to resolve a constitutional doubt." To do so, the dissenters thought, would be "a remaking of the statute and not a construction of it."

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[17]Mr. Justice M'Lean dissented vigorously.

[18]E.g. *United States* v. *Walter*, 263 U. S. 15 (a statute punishing conspiracy to defraud "any corporation in which the United States . . . is a stockholder" held restricted to federal instrumentalities such as the Emergency Fleet Corporation); *The Abby Dodge*, 223 U. S. 166 (a statute regulating the sale of sponges "from the Gulf of Mexico or Straits of Florida" construed to exclude state territorial waters). The statute in *The Abby Dodge* case, referring to oceanic waters, might well be limited under the "two interpretations" rule of the *Jarman* case, *supra*, note 10. The *Walter* case approved a more radical emendation.

[19]33 U. S. C. 901-50.

But in the general stream of constitutional decision these cases are unusual. "An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains", wrote Mr. Justice Holmes in *United States* v. *Ju Toy*, 198 U. S. 253, 262, and he added: "That has been decided over and over again."

The leading decision in the line of cases to which Mr. Justice Holmes had reference is *United States* v. *Reese*, 92 U. S. 214. A statute punishing wrongful refusal to count votes was unconstitutional, unless construed as limited to a refusal based upon racial grounds, which would come within the scope of the Fifteenth Amendment. The court declined so to limit the statute by implication, and Chief Justice Waite said (92 U. S. 221):

> "We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish . . . The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there . . . The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.
>
> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government . . .
>
> "To limit this statute in the manner now asked for would be to make new law, not to enforce an old one. This is no part of our duty."

The *Reese* case has been consistently and frequently followed, and cited and quoted with approval. In a series of cases, for example, the Court refused to confine general penal or regulatory statutes to the field of interstate commerce, despite the fatal constitutional consequences of the literal and inclusive wording. *Trade-Mark Cases,* 100 U. S. 82; *Illinois Central Railroad* v. *McKendree,* 203 U. S. 514; *The Employers' Liability Cases,* 207 U. S. 463; see also *James* v. *Bowman,* 190 U. S. 127; *Baldwin* v. *Franks,* 120 U. S. 678; *Virginia Coupon Cases,* 114 U. S. 269; *United States* v. *Harris,* 106 U. S. 629. In *United States* v. *Fox,* 95 U. S. 670 the Court declined to limit a general penal provision to acts connected with bankruptcy, despite the statutory context. In *Butts* v. *Merchants Transportation Co.,* 230 U. S. 126, the Court declined to give the Civil Rights Act (previously held unconstitutional in the states) application in the territories.

Neither *Crowell* v. *Benson* nor the *Dennis* case appears to have marked any trend away from the rule of these numerous cases declining to save statutes by judicial amendment, for subsequent decisions have reconfirmed the Court's distrust of such techniques. In *United States* v. *Sullivan,* 332 U. S. 689, the Court declined to limit the misbranding provisions of the Food and Drug Act so as to cover only the first sale after shipment in interstate commerce, saying (332 U. S. at 693): "A restrictive interpretation should not be given a statute merely because . . . giving effect to the express language employed by Congress might require a court to face a constitutional question." In *United States* v. *Gambling Devices,* 346 U. S. 441, the Court considered an indictment under a section of the statute prohibiting interstate shipment of gambling machines which required the reporting of all sales of such devices, without reference to shipment. By the concurrence of five members, the indictment was dismissed, and three of the majority thought the

section could and should be restricted to sales in connection with interstate shipments. But neither the other two nor the four dissenters[20] would join in this construction, and the *Sullivan* case was cited as authority against the proposed judicial amendment.

It is apparent, we submit, that the policy of narrow construction to avoid constitutional issues has had and should continue to have a restricted range of application. Where there is a gap in the import of the words as in the *Jarman* case, or where a word or expression found in the statute may mean very different things to different people, the policy is a legitimate tool of judicial self-restraint. But the Court should not, and has generally refused to, escape from constitutional difficulties by the fabrication of limitations for which no basis can be found in the wording or background of the legislative act. To do so, as Chief Justice Waite remarked in the *Reese* case, *supra*, merely substitutes another constitutional difficulty for the one evaded. And, as Mr. Justice Frankfurter observed in *62 Cases of Jam* v. *United States*, 340 U. S. 593, 596:[21]

> ". . . our problem is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort."

### B. Specific Intent May Not Be Read Into the Statute by Implication

The second question in the Court's order concerns not the general criminal intent known to the common law as

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[20]The two other majority Justices thought the statute bad for vagueness. The four dissenters saw no constitutional defect.

[21]*Cf. DeSoto Securities Co.* v. *Commissioner of Internal Revenue*, 235 F. 2d 409 (7th Cir.), at 411: "Courts have no right, in the guise of construction of an act, to either add words to or eliminate words from the language used by congress."

*mens rea,* but a specific intent to overthrow the government by force and violence. As introduced in Congress, the membership clause of the bill that became the Smith Act did not expressly require *mens rea;* this element was added as a Senate amendment, by insertion of the word "knowingly."[22] The government now proposes to add by judicial amendment the requirement of specific intent, which Congress might have included but did not when the bill was considered, amended, and enacted.

The distinction between *mens rea* and specific intent is discussed in *Morissette* v. *United States,* 342 U. S. 246. Generally speaking, the common law did not require proof that the accused intended to violate the law, of which he might have been ignorant, or which he might have believed to be inapplicable or outweighed by social or ethical considerations. But the common law did require a showing that the accused had not transgressed accidentally or unconsciously, but rather with a conscious purpose to do the injurious act which the law prohibited. Since this sort of intent is a traditional element of criminal guilt, criminal statutes often do not expressly require it; nevertheless, the courts will generally assume that *mens rea* must be established, as this Court assumed in the *Morissette* case itself.

The issue was pressed in the *Morissette* case as a result of the proliferation, during the last century, of so-called "public welfare offenses," wherein the act is punishable regardless of the presence or absence of *mens rea.*[23] For example, legislatures have concluded that the public welfare requires that the sale of liquor to minors or habitual drunkards, or the sale of adulterated milk, shall be punishable even if the bartender does not know that his customer is a juvenile or a souse, and the milk distributor does not know that the farmer or middleman has watered the milk.

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[22]Pet. Br., pp. 17 and 19.

[23]Sayre, *Public Welfare Offenses,* 33 Col. L. Rev. 55 (1933).

During the early years of the century and shortly after he First World War, a number of states enacted laws unishing advocacy of anarchy or syndicalism, or member- hip in such groups.[24] Most of these statutes did not ex- ressly require *mens rea*, and in prosecutions under them the uestion repeatedly arose whether or not *scienter* was a ecessary element of the proof. The decisions were not niform, but it was generally held that *mens rea* (*scienter*) as not essential, and that the State did not have to prove, nd the accused could not defend on the ground, that he had o knowledge that the organization in question was anarchist r syndicalist in its teachings.[25]

These decisions were later sharply criticized as un- easonably harsh,[26] and it is against this background that he insertion of "knowingly" in the membership clause ecomes meaningful. Plainly, Congress wished to preserve he traditional common law intent—*mens rea, scienter*— s an element of the offense under the membership clause,[27] it is under most criminal statutes.

But this very amendment strongly indicates that the embership clause should not be construed to require spe- fic intent.[28] Except in rare instances, such intent is not

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[24]See Pet. Br. pp. 17-19.

[25]See the cases cited in Pet. Br., p. 18 note 17, and in Sayre, *op. supra*; pp. 81-82.

[26]E.g. Sayre, *loc. cit. supra.*

[27]In this context, "knowing the purpose thereof" is the same as dinary criminal intent, for the knowledge makes it clear that the fendant intended to do the prohibited act. See the *Morissette* case, *pra*, at p. 271: ". . . whether the mental element that Congress quired be spoken of as knowledge or as intent, would not seem to er its bearing on guilt."

[28]The three general categories discussed herein may be illustrated statutes punishing the sale of liquor to habitual drunkards. If the rtender serves liquor to a personable and well-behaved stranger, will not be criminally liable if the stranger is in fact an habitual unkard, unless the statute is of the "public welfare" type, in which act alone carries guilt. If the bartender is ignorant of the law, d serves a single drink to one whom he knows as a lush hoping

an element of crime,[29] and it therefore should not be implied in the absence of explicit statutory language. When Congress has wished to require a specific intent over and above *mens rea*, it has given verbal expression to that purpose. As Mr. Justice Jackson wrote in the *Morissette* case, *supra* (at pp. 264-65):

> "Congress has been alert to what often is a decisive function of some mental element in crime. . . . it has at times required a specific intent or purpose which will require some specialized knowledge or design for some evil beyond the common-law intent to do injury."

Despite these well-settled principles, the Government argues (Govt. Br. pp. 47-48) that intent should be "read into" the membership clause[30] under this Court's decision

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then to set him on the homeward path, the bartender intended to do the prohibited act, has *mens rea*, and is guilty under ordinary principles even though his intentions were kindly. Whether or not aware of the law, if the bartender intends to achieve the usual result of serving liquor to an habitual drunkard, he has "specific intent."

[29]Specific intent to betray is an element of the crime of treason. *Cramer* v. *United States*, 325 U. S. 1; *Kawakita* v. *United States*, 343 U. S. 717; *Chandler* v. *United States*, 171 F. 2d 921 (1st Cir.); see *Morissette* v. *United States*, 342 U. S. 246, 265. That is because acts wholly innocent on the face of things may be treasonable if done with intent to betray. In wartime, for example, the labor leader who calls a strike, or the military procurement official who selects one weapon in preference to another, might be lauded or damned for his decisions but, if it were shown that his decisions were prompted by communication with and bribes from the enemy, the intent to betray thus proved would make treason.

[30]The Government's brief, however, speaks of "personal intent," and of "the natural conclusion that intent is an element of the crime the statute denounces" (Govt. Br. p. 48) in a way that seems to betray a confusion between common-law intent or *mens rea* (which the membership clause expressly requires by virtue of the word "knowing," and might well be held to require even in the absence of that word), and specific intent to overthrow the government, which is a "design for some evil beyond common-law intent to do injury." Because of this confusion, most of the Government's dis-

in *Dennis* v. *United States*, 341 U. S. 494. There the charge was conspiracy to advocate violent overthrow and to organize the Communist Party as a group so advocating, in violation of the first and third paragraphs of the Smith Act. On appeal, the defendants complained of the judge's charge that specific intent to overthrow the government by force was an essential element of the crime.[31] The issue arose because of variations in the wording of the several paragraphs of the Smith Act; the first paragraph (advocacy) is qualified by the phrase "knowingly or wilfully," the second paragraph (distribution of literature) expressly requires intent to overthrow or destroy the government, and the first clause (the second clause being the membership clause itself) of the third paragraph (organizing groups) contains no express requirement of knowledge or intent. The Court held that specific intent is an essential element of the crime under the advocacy and organizing provisions, despite these variations of language.

Insofar as the Court's decision affects the advocacy paragraph which contains[32] the word "wilfully", it is in line with the *Hartzel* and *Screws* cases, *supra* (p. 7),[33] and does

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cussion of this point is wide of the mark. The single reference to *mens rea* in the Court's discussion of this point in the *Dennis* case (341 U. S. at p. 500) does *not* reflect the same confusion, for it was addueed simply to show that states of mind is customarily a ubject of inquiry in criminal trials.

[31]The defendants had in fact requested such a charge, but the Court (341 U. S. at 500 note 2) "treated this point because of the liscussion accorded it by the Court of Appeals and its importance o the administration of this statute. . . ."

[32]The word is present in the disjunctive with "knowingly," but he Court did not regard the "or" as governing, in view of its eneral approach to the statute.

[33]The Court cited (341 U. S. at p. 500) the *Screws* case, together ith *Williams* v. *United States*, 341 U. S. 97, 101-02 (following the *crews* case) and the *Cramer* case, *supra* p. 14 note 29.

On argument at the last term, Mr. Justice Frankfurter asked hether or not the *Screws* case went as far, by way of judicial amend-

not bear on the membership clause, which contains only the word "knowing." Insofar as the decision covers the organizing clause as well, the Court took the view that the organizing of a group to advocate violent overthrow, like the advocacy itself, connotes specific intent (341 U. S. at 499); "Certainly those who recruit and combine for the purpose of advocating overthrow intend to bring about that overthrow."[34]

If advocating, or organizing groups to advocate, violent overthrow carries its own proof of intent to cause overthrow, then it makes little practical difference whether or not specific intent is treated as an essential element of the offense, since it is taken as proved if the other elements are proved. In the Smith Act conspiracy cases, the defendants are charged with direct complicity, as principals or conspirators, in advocating or organizing groups to advocate violence. If so much be proved, it is not unreasonable to infer specific intent as a corollary.

But this reasoning is utterly inapplicable to the membership clause, which proscribes no conduct from which such intent may be derived. See *Yates* v. *United States*, 354 U. S. 298, 331. It is directed not at action such as advocacy or organization, but at the status of "knowing" membership. Yet it is common knowledge and a matter of official cognizance that the motives for joining the Communist Party are diverse, and are often wholly unrelated to

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ment, as the Government proposes here. Of course, only four justices relied on the specific intent construction in the *Screws* case, but in any event that construction was no different from the one unanimously given to the same word in the *Hartzel* case, and neither decision seems applicable to the membership clause, which does not contain that or any comparable word. The sharp divisions within the Court in the *Screws* case related primarily to other issues.

[34] In this respect, the Court followed the reasoning of Judge Learned Hand in the court below. *United States* v. *Dennis*, 183 F. 2d 201, 214-15 (2nd Cir.).

or even inconsistent with an intent to overthrow the government by violence.[35]

Thus, the entire basis of the inference relied on in the *Dennis* case is lacking here.[36] Therefore, the words of the membership clause should be given their normal meaning, which comprehends ordinary *mens rea* but not specific intent.[37] Especially should this be so when, as here, the bill was amended so as expressly to require *scienter*, but not to require specific intent. In this particular the Smith Act was the product of long discussion and redrafting in committee[38] and, as Mr. Justice Jackson said in the *Moris-*

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[35] *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 245-46; *The Communist Party of the United States—A Handbook for Americans*; published by the Internal Security Subcommittee of the Senate Judiciary Committee (84th Cong., 1st Sess., Dec. 21, 1955) pp. 43-50 (describing, *inter alia*, Hollywood "communism with two butlers and a swimming pool"); Hoover, *Masters of Deceit* (1958) pp. 105-16. See also Pet. Br. p. 24.

[36] It should also be noted that the Smith Act debates contain several statements supporting the requirement of specific intent under the advocacy and organizing clause. 84 Cong. Rec. 10454 (Representative McCormack); 86 Cong. Rec. 8345 (Senator Danaher) and 8346 (Senator Connally: "wilfully" means with evil intent—more than "willingly"—to evade the law). There are no such indications with respect to the membership clause.

[37] Admittedly, the normal construction gives the membership clause wider scope than if restricted by specific intent. But there is absolutely no indication that this was not intended, and any argument based on harsh consequences is well answered by Mr. Justice Frankfurter's remarks (dissenting) in *Singer* v. *United States*, 323 U. S. 338, 346:

> "In the past, to soften the undue rigors of the criminal law, courts frequently employed canons of artificial construction to restrict the transparent scope of criminal statutes. I am no friend of such artificially restricted interpretations. Criminal statutes should be given the meaning that their language most obviously invites unless authoritative legislative history or absurd consequences preclude such natural meaning."

[38] According to Senator Connally, who was in charge of the bill on the Senate floor, the amended bill was the product of two weeks of work in committee, with the assistance and participation of the Solicitor-General and the Legislative Drafting Service. 86 Cong. Rec. 8345.

*sette* case, *supra* (p. 12), Congress has been "alert" to require specific intent expressly when such was the legislative purpose.

### C. "Activity" May Not Be Read Into the Statute by Implication

The second sentence of the third question in the Court's order is whether the membership clause may permissibly be construed as requiring, as an element of the crime, proof that the accused is an "active" member of the organization in question. Petitioner does not believe that this is a permissible construction and, according to its previous brief, the government is of the same opinion.[39]

Proof of membership may, of course, involve proof of acts from which membership may be inferred. Such indicia were described in *Galvan* v. *Press*, 347 U. S. 522, 528-29, and include acts such as paying dues, attending meetings, and doing some of the work of the group. See *Fisher* v. *United States*, 231 F. 2d 99, 107 (9th Cir.).

Would proof of "active" membership require proof of more acts than are necessary to prove membership? If not, the meaning of the statute is not changed, and the insertion of the adjective would be nugatory. If so, then "membership" must be given a more restricted scope than its normal meaning carries. Certainly there is no warrant for this in the legislative history, nor has any such suggestion been advanced.

How active is "active"? Is the measure qualitative or quantitative; is it based on time consumed, or on intensity or efficacy? The trial judge regarded the matter temporally, and charged the jury (R. A41) that the test was "how much of his [the defendant's] time and efforts he

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[39]Govt. Br. p. 67. As to activity as a "controlling constitutional standard", see *infra*, pp. 34-36.

devoted to the Party." To be "active", the judge declared, "he must have devoted all, or a substantial part, of his time and efforts to the Party."

Suppose, over and above proof of membership, there is evidence of but one additional act of but a few seconds' duration, closely connected with espionage. Is this sufficient proof of "activity"? Or there may be proof of many months of work at some perhaps misguided but clearly lawful activity such as procuring signatures to the Stockholm peace appeal (*cf.* R. 186-88). Is this better proof of "activity" than a single, brief act more closely related to violence?

There is no place to turn for an answer to such questions, and this is itself strong evidence that the proposed qualifying amendment is not permissible. Surely a statute should not be strained from its natural intendment in an effort to avoid the impact of the First Amendment, only to render the statute indubitably unconstitutional for vagueness under the Fifth Amendment. *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500.

This being so, it is perhaps superfluous to recall that the indictment does not charge the defendant as an "active" member. Therefore, if activity be an essential element of the crime, the indictment must be dismissed for lack of that essential element.[40]

### D. The Membership Clause Should be Construed As Stated in the First Question in the Court's Order

The foregoing analysis establishes that the membership clause may not permissibly be construed as requiring either specific intent (over and above common-law *mens rea*) or "activity" as an element of the offense. There is no reason to construe it other than in accordance with the normal intendment of the words, as requiring a charge and proof

[40]Pet. Br. pp. 41-44.

that the accused was a member of a group that advocates violent overthrow of the government, including the usual proof of common-law *scienter*—to wit, knowledge that the group had the purpose of engaging in the forbidden advocacy, showing that the accused intended to join such a group.

The government has not yet undertaken to defend the constitutionality of the clause unadorned, and it should be remarked that the emendations they propose are far more drastic than anything involved in the authorities so far examined. The two additional elements described in the second and third questions in the Court's order, in conjunction, are already a double alteration. Both relate to the "member", but the government's defense of the clause is based upon still further amendments, qualifying both the "member" and the "group" of which he is a member.

In this effort, as has already been pointed out,[41] the government confuses the range of evidence in the particular case with the crime defined in the statute, as charged in the indictment. This has led the government into a defense of the clause's constitutionality based on the hypothesis that the defendant is not only an "active"" but also a "rigidly disciplined" and "high level"[42] member, and that the group not only has the proscribed purpose, but also is "tightly disciplined", "quasi-military" and "deeply conspirational."

How the statute so redrawn would look, has already been demonstrated by comparative print.[43] Attention is invited to *Lanzetta* v. *New Jersey*, 306 U. S. 451, 456,

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[41]Pet. Rep. Br. p. 3 note 6; *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453.

[42]As to "high level", see *Yates* v. *United States*, 354 U. S. 298, 308, where it is stated that the membership clause "proscribes membership in such an organization without drawing any distinction between those holding executive office and others."

[43]Pet. Rep. Br. p. 2.

wherein Mr. Justice Butler used just such a means for his analysis of a New Jersey statute directed at any "person . . . known to be a member of any gang. . ." The New Jersey courts had upheld the constitutionality of that statute by glossing in the meaning of "member" and "gang", but this Court unanimously rejected such efforts to salvage constitutionality by extensive judicial re-writing.[44]

Insofar as the government seeks to limit "member" by such adjectives as "high level" and "rigidly disciplined", the internal evidence of the clause itself is to the contrary. Its coverage extends not only to members, but also to anyone who "affiliates with" a proscribed group, and this phrase certainly embraces a far looser relation between the accused and the group than the steel chains the government would forge.

Standing alone, the clause is not susceptible to such wholesale re-writing. In the context of the Smith Act as a whole,[45] additional and equally serious objections arise. For the progressive effect of the various limitations and qualifications proposed by the government is to make the

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[44]The opinion suggested (306 U. S. at 458) that the word "member" is itself too vague for constitutional purposes. *A fortiori*, the difficulty should not be aggravated by even vaguer qualifying adjectives such as "active."

[45]It should be noted that the "separability" clause of the Smith Act (Section 40, 54 Stat. 676) cannot be invoked to support the various limitations which the government seeks to read into the Act. Such a clause may, indeed, justify a narrow construction of the words of the statute, and rejection of "any implication" which would extend the act beyond the constitutional sphere. See *Crowell* v. *Benson*, 285 U. S. 22, 63; *United States* v. *Dennis*, 183 F. 2d at 214. But a separability clause cannot furnish the basis for adding qualifying words and phrases which are not found in the statutory language. *United States* v. *McElroy*, 259 F. 2d 927, 931-32 (D. C. Cir.). In *Crowell* v. *Benson*, *supra*, wherein the dissenting justices thought the exception for jurisdictional facts unwarranted by the language, Mr. Justice Brandeis found it unnecessary even to mention the separability clause, 33 U. S. C. 950.

membership clause a redundant duplicate of the other provisions of the Smith Act.[46]

These other sections, either expressly or by necessary implication, involve specific intent to overthrow the government by violence; the membership clause does not, so it is proposed to be added by judicial amendment. The other sections proscribe acts such as oral or written advocacy or the organization of groups; the membership clause punishes status only, but now it is suggested that "activity" be also required. The other provisions have been upheld by this Court in conspiracy cases largely on the ground that conspiratorial power creates the necessary degree of danger to established government;[47] the membership clause says nothing of conspiracy or concert of agreement or action, but now the government would have it upheld as applying to "deeply conspirational" groups.

There is no need to labor the point that such deliberately-induced redundancy violates the most elementary principles of judicial construction.[48] If petitioner's conviction is sustained on any such basis, the consequence will be that he has been convicted of conspiracy to advocate violent overthrow of the government, under a statute and an indictment which charge neither conspiracy nor advocacy.

In *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, the Court was confronted with a comparable effort to salvage a statute's constitutionality by extensive judicial reconstruction. Speaking for a unanimous court, Chief Justice Taft pointed out[49] that the Constitution requires both that the courts eschew legislative functions and that criminal statutes be

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[46]Pet. Br. pp. 30-32.

[47]Pet. Br. pp. 22-23.

[48]*Singer* v. *United States*, 323 U. S. 338, 344. The dissenting Justices did not agree that the narrower construction which they favored would create a redundancy.

[49]Pet. Rep. Br. p. 3, wherein a portion of the opinion is quoted.

easonably precise, and that the proposed interpretation of he statute was vulnerable on both scores.

So are the government's proposals in the present case. Their adoption would be sheer judicial legislation, and their ffect would be to render the membership clause redundant nd vague, and to compound the constitutional defects with which it is already afflicted.

## I. APPLICABILITY OF THE "CLEAR AND PRESENT DANGER" STANDARD

The answers to the constitutional issues posed in the irst three questions in the Court's order depend in part on he answer to the fourth question, relating to what the rder describes as "the 'clear and present danger' doctrine." nitially, it is asked whether or not that doctrine applies to he membership clause at all, or applies to the "member" r the "group" or both.

As petitioner reads the government's previous briefs, he Solicitor-General treats the "clear and present danger" tandard as applicable to the membership clause, as it is to he rest of the Smith Act.[50] Petitioner is in agreement with his view and, with all respect, sees no basis in the decisions f this Court for a contrary conclusion.

It is true that in the *Dennis* case Mr. Justice Jackson roposed[51] that the "clear and present danger" standard be ised only in cases of on-the-spot agitation, incendiarism, or ivil disobedience, and be discarded in cases involving "a vell-organized, nation-wide conspiracy." But all the other nembers of the Court thought and held otherwise, deeply s they differed on the meaning and effect of applying the tandard to the Smith Act. The *Yates* case, too, implicitly

[50]Govt. Br. pp. 55 and 66 note 27.

[51]*Dennis* v. *United States*, *supra*, at pp. 567-70.

if not explicitly, utilized the standard as the basis of decision.[52]

It is also true that, in the *Dennis* case, the Court's opinion (341 U. S. at 507) described the "clear and present danger" test as inapplicable to a statute concerned not with speech but with the regulation of labor unions. *Communications Assn* v. *Douds*, 339 U. S. 382. The implications of that analysis are extensive and debatable,[53] but irrelevant here. For the Court also declared that under the charge in the *Dennis* case (341 U. S. at 508) ". . . we are squarely presented with the application of the 'clear and present danger' test, and must decide what that phrase imports."

This conclusion was rested on the Smith Act's direct impact on and restriction of speech. That impact is no less direct under the membership clause than the other provisions of the Smith Act. The difference is that here the accused's alleged connection with the forbidden advocacy is by membership in a group, whereas in the *Dennis* and *Yates* cases it was by participation in a conspiracy to advocate. This difference is enormously significant, petitioner believes, in the *result* of administering the "clear and present danger" test, but the test itself is equally applicable under the several provisions of the Act.

In answering this question in the affirmative, petitioner does not suggest that the "clear and present danger" standard is self-defining or an absolute measure, or that the test must be applied in the exact words as first written by Mr. Justice Holmes in *Schenck* v. *United States*, 249 U. S. 47, 52. The "doctrine" of "clear and present danger", if such it may be called, is simply the use of that phrase to indicate that the prohibitions of the First Amendment are not absolute, and to suggest that there is a range of necessary in-

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[52] *Yates* v. *United States*, *supra*, at pp. 318-21.

[53] *Cf. United States* v. *Dennis*, 183 F. 2d at 211-12.

quiry to determine whether a particular governmental restriction on free speech, press, or assembly may or may not be enforced. Two years before the *Schenck* decision Judge Learned Hand discussed the problem with a very parallel outlook but in altogether different verbiage. *Masses Pub. Co.* v. *Patten,* 244 Fed. 535 (S. D. N. Y. 1917). Thirty years later he undertook to particularize the meaning of "present" danger in the context of the Smith Act as applied to the leaders of the Communist Party, and restated the standard in words explicitly approved by this Court on review.[54]

Obviously, there can be no single or preclusive phrasing of the general principle of limitation on the general language of the First Amendment. But as long as the First Amendment is part of the Constitution and is treated as a substantial but not an absolute prohibition of governmental restriction of speech, there must be judicial inquiry when the courts are asked to enforce the restrictions. In saying that the "clear and present danger" standard applies to the membership clause, petitioner means that cases under that clause present constitutional issues under the First Amendment to which the Court should apply that standard, as refined and interpreted during the intervening years.

It follows (in response to the last clause of the first sentence of the Court's fourth question) that, in applying the standard under the membership clause, no line may be drawn between the "member" (or "affiliate") and the "society, group, or assembly of persons." Each of these phrases is meaningless without the other, as with the *yin* and *yang* of Chinese symbolism. An accused is not a "member" or "affiliate" *in vacuo;* he is a "member" or "affiliate" *of* a "society, group, or assembly", and these words denote an aggregation not of abstractions, but *of* "members" and "affiliates." The pinch of the statute is on the specified

[54]Pet. Br. pp. 20-22.

*relationship* (membership or affiliation) between the accused and the specified society, group, or assembly (one having the purpose to advocate violent overthrow of the government).

The issues under the First Amendment[55] are whether a statute condemning this relationship may be upheld on its face under the "clear and present danger" standard and, if so, whether that standard permits the statute to be applied in this case by punishing the defendant for the specific relationship made out under the indictment and on the record.

The second sentence of the Court's fourth question may refer to the *method* of resolving these issues, or to the *rightness* of the conclusion reached. With respect to the method, before the *Dennis* and *Yates* cases it was much debated whether the "clear and present danger" standard should be applied by the trial judge or by the jury, and that is one of the questions on which the Court divided in the *Dennis* case. Petitioner does not read the Court's order as reopening this problem, and the petition for certiorari did not present it for review.[56]

With respect to the conclusion reached below, of course it is petitioner's position that the "clear and present danger" test was wrongly applied. The membership clause on its face is unconstitutional under the First Amendment, and the indictment should have been dismissed. On the basis of the record, the First Amendment prohibits

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[55]These issues are not co-extensive with the entire question of the constitutionality of the membership clause as presented in this case, for there also are issues under the Fifth and Sixth Amendments. Pet. Br. 27-28, and *infra*, pp. 27-28.

[56]If, as has been consistently done under the Smith Act, the standard is to be applied by the trial judge, petitioner respectfully suggests that a written determination on the record, giving reasons, would be good practice and would facilitate appellate review. Since it is a mixed question of fact and law, appellate review should be *de novo*, as the *Dennis* case (341 U. S. at 510-11) suggests.

the enforcement of the membership clause in this case, and therefore the case should not have gone to the jury. The reasons for these conclusions have been set forth in our previous arguments on constitutionality, and are amplified hereinafter.[57]

## III. CONSTITUTIONAL INVALIDITY OF THE MEMBERSHIP CLAUSE ON ITS FACE

On argument at the last term, government counsel declared that petitioner's attack on the constitutionality of the membership clause is based primarily on "guilt by association." This statement revealed a confusion of two related but distinct constitutional defects in the membership clause, which should be dissipated at the outset.

### A. Invalidity Under the Fifth Amendment

The phrase "guilt by association" denotes the imputation of guilt under circumstances where the accused's connection with the proscribed conduct is so remote that it offends basic standards of fairness to hold him criminally responsible. It arises, consequently, under the due process clause of the Fifth Amendment, and has no necessary or particular connection with the First Amendment. For example, the state statutes which sought to punish "associating" with reputed burglars and thieves[58] raised no First Amendment problems in terms of free speech or press, nor would a statute imposing criminal liability on a landlord for larcenies committed by his tenants.

On this point, petitioner has little to add to the previous brief.[59] By and large, criminal statutes have been drawn in line with the familiar common-law concepts of criminal

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[57] Pet. Br. pp. 15-41; *infra*, pp. 27-34.
[58] Pet. Br. p. 30 note 38.
[59] Pet. Br. pp. 27-30.

liability for principals, accessories, and conspirators. "Membership" is not such a concept, and its outlines are vague. See *Lanzetta* v. *New Jersey*, 306 U. S. 451, 458. To impose on a "member" of a "society, group, or assembly" criminal responsibility for the acts of other members, lacking any charge of conspiracy or personal participation, would seem to tip the beam of due process and, as a distinguished lawyer has remarked,[60] to import into our law an "alien doctrine" which has not yet been recognized by this Court.

**B. Invalidity Under the First Amendment**

Although the taint of "guilt by association" is thus a distinct constitutional defect in the membership clause, it is nevertheless closely related to the issue under the First Amendment. For undeniably, the accused member's remoteness from the advocacy which the Smith Act proscribes renders the clause vulnerable under the "clear and present danger" test as applied in the *Dennis* and *Yates* cases. Here, again, petitioner relies primarily on the previous briefs.[61]

However, there is occasion for some further analysis of *Whitney* v. *California*, 274 U. S. 357, extensively cited in the previous briefs on both sides.[62] On argument, Mr. Justice Frankfurter suggested that the concurring opinion of Mr. Justice Brandeis was grounded on the proposition that the danger of a revolution "at some date necessarily far in the future" (274 U. S. at 379) is not sufficiently "present" to justify suppression of the advocacy, and that this proposition was repudiated by the Court in the *Dennis* case.

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[60]Pet. Br. p. note 34.

[61]Pet. Br. pp. 15-26; Pet. Rep. Br. pp. 1-2.

[62]Pet. Br. and Pet. Rep. Br. *loc. cit. supra*; Govt. Br. pp. 53-55.

It is respectfully suggested that the entire opinion does not depend or hinge on the phrase in question. Mr. Justice Brandeis discussed the case from several different standpoints in the course of the opinion's eight pages, and it is true that part of what he wrote[63] is concerned with the imminence of the danger in a temporal sense. But his opening analysis of the California anti-syndicalism statute (274 U. S. at 372-73) emphasizes a wholly different kind of remoteness: the rope of sand between the accused "member" and the proscribed advocacy. That is the same kind of remoteness from which the membership clause suffers, and Mr. Justice Brandeis sharply described the "novelty" of punishing a person not for his own acts of incitement, or for conspiracy, but merely for "becoming a member" of a society and thereby engaging in "association with those who propose to preach" the forbidden doctrine.

All of this would be directly pertinent to the present case even if, elsewhere in the opinion, the views on temporal imminence were to be regarded as obsolete. However, it is not at all clear that they are, and it is noteworthy that Mr. Justice Brandeis' opinion in the *Whitney* case was mentioned with what appears to be explicit approval in the *Dennis* case itself (341 U. S. at 507) and, very recently, in *Kingsley Int. Pic. Corp.* v. *Regents*, 360 U. S. , 79 S. Ct. 1362, 1365-66.[64]

Furthermore, there is no essential conflict between Mr. Justice Brandeis' theory of "present" danger as stated in the *Whitney* case, and the rule applied in the *Dennis* and

[63] 274 U. S. at 376-77; see also Judge Learned Hand's discussion of the *Whitney* case in *United States* v. *Dennis*, 183 F. 2d at 208-09.

[64] Mr. Justice Stewart, writing for the Court, quoted Mr. Justice Brandeis' sentences distinguishing advocacy from incitement to action, and emphasizing that suppression of speech is not the constitutionally proper way of preventing crime. Mr. Justice Frankfurter, in his concurring opinion (79 S. Ct. at 1368), spoke of "the opinions of Mr. Justice Holmes and Mr. Justice Brandeis, to whom we predominantly owe the present constitutional safeguards on behalf of freedom of expression."

*Yates* cases. To be sure, both of the later cases hold that there may be culpable advocacy of violent overthrow even though the prospect of actual revolution is not imminent. But the *Yates* case held that there must be something more than advocacy of revolution in the indefinite future. Such advocacy could hardly be regarded as "incitement" which, as the Court points out (354 U. S. at 320), "is usually thought of as something calculated to induce immediate action." The opinion in the *Yates* case is clear that, although the day of revolution may be distant, there must be advocacy of some kind of preparatory action in the calculable, if not the immediate future. The illustrations from the record in that case, upon which the Court relied (354 U. S. at 331-33), all involved the indoctrination or training of Party members in such things as sabotage and street fighting, or the creation of an organization to undertake (354 U. S. at 332) "tasks which would be useful when the time for violent action arrived."

But the impact of the membership clause is not on "action" of any sort. The impact is on the "member" or "affiliate" relation itself, without reference to the accused's own "actions", if any. This is precisely what Mr. Justice Brandeis described (274 U. S. at 373) as the "novelty in the prohibition" of similar provisions in the California anti-syndicalism law. In contrast, the other provisions of the Smith Act which the Court has sustained require that the accused, as principal or conspirator, be shown to have engaged in advocacy which incites to some kind of action (354 U. S. at 320) "for the forcible overthrow of the Government, and not of principles divorced from action."

### C. Insufficiency of the Proposed Additional Elements of "Specific Intent" and "Activity"

The foregoing analysis establishes, petitioner submits, that neither of the judicial amendments proposed in the

second and third questions in the Court's order would significantly alter the resolution of these constitutional issues. Even if both "specific intent" and "activity" were to be added as elements of the offense, the membership clause would still be devoid of any charge of agreement between the accused and other members of the group, or of participation by the accused in the forbidden advocacy. Without these factors, the "clear and present danger" standard as developed in the *Dennis* and *Yates* cases is not met.

The crucial distinction under the First Amendment is between, on the one hand, a charge of action, advocacy of action, or conspiracy to advocate action directed toward violent overthrow, which this Court has held under the circumstances shown or assumed in the *Dennis* and *Yates* cases to constitute a "clear and present danger" even though the time of revolution is indefinite, and on the other hand the charge here of mere association through membership or affiliation with a group some of whose members may, collectively or individually, advocate violent overthrow, without any charge that the accused entered into any agreement or participated with those other members in their unlawful conduct.

Obviously, this gap may not be filled merely by an added charge of specific intent, utterly divorced from action to give practical effect to the intent. Except for the loose association denoted by "membership" or "affiliation", the parallel to the old crime of constructive treason is precise. But, as Mr. Justice Jackson observed in his concurring opinion in the *Douds* case, *supra* (339 U. S. at pp. 437-38), the Constitution "was intended to end such prosecutions", and:[65]

> "Only in the darkest periods of human history has any Western government concerned itself with mere

[65] See also *Cramer* v. *United States*, 325 U. S. 1, 20, 28-29, 61, and 69-72.

> belief, however eccentric or mischievous, when it has not matured into overt action; and if that practice survives anywhere, it is in the Communist countries, whose philosophies we loathe."

An added element of "activity" would be of even less constitutional significance. "Communists, we may assume, carry on legitimate political activities." See *Communications Assn* v. *Douds,* 339 U. S. at 393. The five *Yates* case defendants acquitted by this Court's order "had long been members, officers or functionaries of the Communist Party" (354 U. S. at 330) and, in those capacities, must surely have been exceedingly "active." Nevertheless, as the Court held, such activity makes out no case under the Smith Act because of the bar of Section 4(f) of the Internal Security Act (*Ibid.*). Nor, since these activities appeared to be "wholly lawful" (*Ibid.*), did that active Party membership and office-holding establish anything in the way of action-inciting advocacy, such as might meet the "clear and present danger" standard.

In his opinion below in the *Dennis* case, Judge Learned Hand observed (183 F. 2d at 208-09 and 212), that the justification for the requirement of "*present* danger" is that an intervening period between the advocacy of violence and the prospect of its actual use "may check its effect and change its importance", through "opportunity for the corrective of public discussion" or other circumstances.[66] Certainly the present case strikingly illustrates the practical as well as the theoretical merit of this analysis.

When there is advocacy of concrete preparatory action, it may be said (as the *Dennis* and *Yates* cases do say by implication) that there is no time for public discussion to exert its ameliorating effect, and the danger may grow to the point where repressive action comes too late. But no

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[66] Judge Hand regarded (183 F. 2d at 212) the Brandeis-Holmes concurring opinion in the *Whitney* case as based on this rationale.

such conclusion can be drawn in a prosecution under the membership clause, because there is no meaningful link between the accused and the preparatory action, and there is ample time for public discussion or the pressure of events to work on the member's state of mind, still unfocussed on unlawful individual or collective action.

Official pronouncements and the record of this trial alike indicate how effective public discussion and the course of international events have been as a "corrective" of Communist Party membership. One of the government's principal ex-Communist witnesses testified (Tr. 824-26) that the Party's greatest success in the recruitment of young people was in 1938-39, and that in later years Communist influence fell off. The Director of the Federal Bureau of Investigation has written[67] that from a peak membership of 80,000 in 1944 the Party's numerical strength has declined to 64,600 in 1945, 60,000 in 1947,[68] 43,200 in 1950, 22,600 in 1955, and a further decline in 1957.

The principal present danger, according to the Director,[69] is from the remaining handful of "hard-core" Communist "fanatics" who, it may be assumed, could be charged, like the Party leaders in the *Dennis* and other conspiracy cases, with conspiratorial incitement of action directed toward violent overthrow. But it is indeed difficult to support the notion that membership, with whatever state of mind but without such action, is a sufficient danger to warrant the suppression attempted by the membership clause.

It has been estimated that there are some 700,000 ex-Communists (of whom the accused is one)[70] in the United States today.[71] No doubt many of these are protected

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[67]Hoover, *Masters of Deceit* (1958) p. 5.
[68]*Dennis* v. *United States*, 341 U. S. at 547.
[69]Hoover, *op. cit. supra*, at pp. 4, 78, 112.
[70]Tr. 1983-84.
[71]Ernst and Loth, *Report on the American Communist* (1952) p. 14; Howe and Coser, *The American Communist Party* (1947) 528-29.

against prosecution by the statute of limitations. Be that as it may, there must be many thousands who never advocated violent overthrow or conspired to that end but who, if the membership clause is to be enforced as the government seeks to do here, will be in jeopardy of conviction for felony and up to ten years' imprisonment. Yet on this record and in the light of recent history there is no basis for finding membership in the Party (as distinguished from unlawful advocacy of concrete action) a clear and present danger to the security of the nation or any of the States.

## IV. "ACTIVITY" AS A REQUIREMENT OF CONSTITUTIONAL APPLICATION

The third sentence of the third question in the Court's order asks whether, assuming that (a) "activity" is not added as an element of the offense under the membership clause, and (b) the clause is taken to be constitutionally valid on its face, a constitutional application of the membership clause depends upon a "requirement" of activity and, if so, whether the requirement was properly applied in the present case. These questions are presumably based on the Solicitor-General's contention[72] that "the 'activity' factor is a controlling constitutional standard, to be applied by the *court*, by which to test whether the membership clause has been validly applied in a particular case", and that the "activity" standard is analogous to and applicable in the same manner as the "clear and present danger" standard.

Petitioner has already presented argument against this proposal.[73] Reservation to the trial judge of the "clear and present danger" test has been upheld on the ground that

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[72]Govt. Br. pp. 64-67, based on the Supplemental Memorandum for the United States on Reargument in Nos. 3 and 4, October Term 1957.

[73]Reply Memorandum for the Petitioner on Reargument in No. 3, October Term, 1957, pp. 4-5; Pet. Br. p. 31 note 40; Pet. Rep. Br. pp. 5-6.

the test is of a mixed fact-law nature, and involves "the conflict of momentous public interests" wherein a uniformity of result unattainable through juries is desirable.[74]

The "clear and present danger" standard, therefore, unlike the evidence of an individual member's "activity", is not peculiar to or connected with the Smith Act or any other particular statute. It is a principle of limitation on the general language of the First Amendment, and in the *Schenck* case itself (249 U. S. at 52) Mr. Justice Holmes treated it as applicable to the violation of injunctions (citing *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 439) as well as to statutes.

The Court's question is based on the assumption that the membership clause is valid on its face. If that assumption is to be indulged, no doubt the accused's "activity" could be taken into account, along with other circumstances shown by the evidence or judicially noticed, in determining whether or not the "clear and present danger" test is satisfied. The difficulty is that evidence of mere general "activity" such as that of the five defendants acquitted in the *Yates* case would be irrelevant to the "clear and present danger" standard, for reasons already given.[75] On the other hand, evidence of unlawful advocacy or other conduct prohibited by the other provisions of the Smith Act, would lie far outside the language of the clause (which would thus become redundant), and cause the accused's conviction, without indictment under these other provisions, on evidence relevant to them but not to the membership clause as written.

Further discussion of the point seems especially futile under the circumstances of this case, wherein the government at the trial successfully requested that the issue of activity be submitted to the jury, on appeal declared that

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[74] *Dennis* v. *United States*, 341 U. S. at 512-15; *United States* v. *Dennis*, 183 F. 2d at 215-16.

[75] *Supra*, p. 32.

the submission of this issue was "unnecessary", and now on review here states that the issue should be determined by the judge.[76] If this last-taken position is upheld, the conviction here must in any event be set aside, but petitioner earnestly hopes that the Court will find other or additional grounds for reversal.

## V. SECTION 4(f) OF THE INTERNAL SECURITY ACT AS A BAR TO THIS PROSECUTION

The Court, by the fifth question in its order, has requested counsel to discuss "the relevance of the registration provisions" of the Internal Security Act to the question so posed. The registration provisions are contained in Sections 7 to 9 inclusive of that Act, 50 U. S. C. 786-88.

The registration provisions are enforceable by orders of the Subversive Activities Control Board, specifically directed to particular organizations. These orders are subject to judicial review (50 U. S. C. 793), and an order of the Board directed to the Communist Party of the United States was initially affirmed by the Court of Appeals for the District of Columbia in 1955. *Communist Party of U. S.* v. *Subversive Act. Cont. Bd.*, 223 F. 2d 531 (D. C. Cir.). Following review here and resubmission to the Board, the latest order directing the Communist Party to register was affirmed on July 30, 1959. *Communist Party of U. S.* v. *Subversive Act. Cont. Bd.*, No. 11850 in the Court of Appeals for the District of Columbia, petition for rehearing pending.

The registration requirements of the Act cover the names and addresses of officers and (in the case of Communist-action organizations) of members, and financial records. Members of Communist-action organizations must likewise register their own names (50 U. S. C. 787) in the

[76] Pet. Br. pp. 41-44; Pet. Rep. Br. p. 6; Govt. Br. p. 67.

event that the organization itself fails to register, or fails to include the member's name in its registration statement.

It is these registration provisions which raise the problem of self-incrimination that led to the inclusion of Section 4(f), which is plainly intended to prevent the legislative provisions from being thereby rendered ineffective. Whether or not Section 4(f) is sufficient for its intended purposes is an issue beyond the scope of this case. Petitioner has heretofore set forth the reasons why Section 4(f) must in any event be held to bar prosecutions of Communist members and officers under the membership clause of the Smith Act,[77] and has but a few additional observations to make at this time.

The core of the government's position[78] is that membership plus knowledge is different from "mere" membership—that the knowledge is an additional element of the offense under the membership clause that lifts it above the bar of Section 4(f). Petitioner has pointed out the absurd practical consequences of this position, under which only Communists *without* knowledge of the Party's purposes could be required to register, since only they would have immunity.[79]

But the vice of the government's position lies in the logic as well as the practical consequences of the issue. "Knowledge", as has earlier been pointed out,[80] is not really an additional element of the offense. It is nothing more than the ordinary common-law criminal intent—often called *mens rea* or *scienter*—which the courts will require to be proved under most criminal statutes, whether or not expressly required. See *Dennis* v. *United States*, 341 U. S. at 500: "The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal

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[77]Pet. Br. pp. 44-50; Pet. Rep. Br. pp. 6-8.
[78]Govt. Br. pp. 68-74.
[79]Pet. Br. p. 48.
[80]*Supra*, pp. 11-13.

jurisprudence." The word "knowing" was inserted in the membership clause only to forestall the conclusion reached by some state courts under similar statutes that membership in subversive organizations should be dealt with like the sale of adulterated milk, and be made punishable even if done with innocent intention.

The government argues further that "specific intent" is an additional element, not comprehended within Section 4 (f). But this is a boot-strap proposition. If Section 4(f) would bar this prosecution in the absence of specific intent, which the membership clause does not in terms require, may the bar be avoided by adding new requirements by judicial interpretation? Surely that would be an unwarranted interference with the intention of Congress which, it is clear, was to safeguard the registration provisions of the Internal Security Act by renouncing the criminal proscription of Communist membership under the membership clause of the Smith Act.

On argument at the last term, the government made one further contention, to the effect that petitioner's argument proves too much, in that its acceptance would equally bar prosecutions of Communists under Sections 4(a) and 4(c) of the Internal Security Act itself.[81] But plainly there is no such consequence, for Sections 4(a) and 4(c) prohibit action, as described therein, apart from and independent of membership in any group. A registration statement under the registration provisions of the Act which reveals that X is a member or officer of the Communist Party, reveals the substance of the offense stated in the membership clause, and the accused's only defense (apart from the nature of the Party) would be lack of *scienter*. But an admission or disclosure of membership in a group, even in the Communist Party, does not establish any element of the

[81] These provisions are in Appendix B, *infra* p. 4a, as well as in the previous brief. Pet. Br. p. 3a.

offense stated in Section 4(a), nor any crucial part of the offense stated in Section 4(c).

In summary, the government's interpretation of Section 4(f) as covering only "mere" membership innocent of knowledge is wrong for three basic reasons. Firstly, it is confuted by the internal evidence of Section 4(f) itself, which covers office-holding as well as membership and, as the government itself elsewhere contends,[82] office-holding is itself "strong evidence" of knowledge of the Party's aims. Secondly, the government's view renders Section 4(f) meaningless for, if it applies only to membership without knowledge, there is nothing, in either the Internal Security Act or the Smith Act or any other statute, for Section 4(f) to affect. Thirdly, the government's construction flies in the face of the plain Congressional purpose, and would reduce to futility the registration provisions of the Internal Security Act.

## VI. CONSTITUTIONALITY OF THE MEMBERSHIP CLAUSE AS APPLIED IN THIS CASE

The foregoing discussion of the "clear and present danger" standard relates, of course, not only to the constitutionality of the membership clause on its face, but to its constitutionality as applied in this case. That issue, petitioner hopes, has been sufficiently discussed in the previous briefs, and herein.

In the previous briefs, petitioner has also dealt with the unconstitutional result of the loose order of proof at the trial, the admission of extensive testimony and documents which were incompetent, irrelevant and prejudicial, and especially the blanket use of third party declarations with which the defendant was utterly unconnected.[83] On these matters, likewise, petitioner relies on what has already been presented.

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[82] Govt. Br. p. 85.

[83] Pet. Br. pp. 39-41, and 64-71; Pet. Rep. Br. pp. 10, 42.

### A. Nature of the Evidence Used to Prove Incitement

Petitioner respectfully suggests that the government has deeply misunderstood the nature of the evidence which may constitutionally be relied on to prove incitement, within the meaning of the *Yates* case. At the trial, the government took the view that documents attacking the policies or the acts of the United States Government, and urging public protest against such policies by the written and printed word and in other ways typical of political disputation in a democratic society, constituted evidence of the sort of incitement prohibited by the Smith Act.[84] Likewise the government sought to draw support at the trial from the abusive or repellent character of various documents which were offered and received in evidence, without regard to the question whether these documents, virulent as they were in tone and verbiage, actually embodied any incitement to action.

It appears to the petitioner that this basic error has adhered to the government's case on appeal and on review in this Court. On argument at the last term, government counsel drew the Court's attention to a particular passage in the record which, according to the government, is an especially clear example of the sort of incitement punishable under the Smith Act. The passage in question was taken from a speech delivered in Chapel Hill by a Communist functionary, reading as follows (R. 390-92):

> "In Korea they are still called niggers. Niggers are courtmartialed for refusing to have their men slaughtered. Lieutenant Gilbert is one example. They say that the nigger is yellow. Yellow, give the niggers in North Carolina and Georgia rifles and tell them to fight for their rights. Yellow, man, you will see fighting like you have never seen before."

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[84] Pet. Br. pp. 33-36.

Who was the speaker inciting, and what action was he inciting them to undertake? It cannot be seriously contended that the speaker meant to incite his audience to procure "rifles" and give them to the North Carolina and Georgia "niggers". It seems clear that in this example, as in the case of the Korean war documents on the basis of which the prosecuting attorney specifically invited the jury to find incitement (R. A24), the government has overlooked the plain distinction between what is rhetorical and what is hortatory.

This vital distinction between abuse, however intemperate, of government officials and policies, as compared with actual incitement to unlawful action, was noted by Judge Learned Hand in *Masses Pub. Co.* v. *Patten*, 244 Fed. 535 (S. D. N. Y. 1917). There Judge Hand was confronted with an application for an injunction against the Postmaster to restrain him from excluding from the mails certain literature embodying what Judge Hand described (244 Fed. at 539) as "a virulent attack upon the war". Upon concluding (244 Fed. at 542) that the legal problem was the same as would have been presented by a motion to dismiss an indictment under the Espionage Act based on these documents, Judge Hand wrote (244 Fed. at 540):[85]

> "If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation."

Unless this basic distinction between virulence and incitement to violence is to be observed in the enforcement of the Smith Act and other statutes restricting freedom

[85] Judge Hand's decision granting the injunction was reversed by the Circuit Court of Appeals, 246 Fed. 24. But his opinion was cited with approval by Mr. Justice Brandeis in *Whitney* v. *California*, (274 U. S. at 376), and was quoted by Mr. Justice Jackson in his concurring opinion in the *Dennis* case (341 U. S. at 571).

of expression, the protection of the First Amendment will indeed be reduced from substance to shadow. The lower court's rationalization of this sort of evidence as admissible because it "blackens the United States" (R. 480-81) is a sufficient indication of the extreme danger to freedom of expression which the petitioner's conviction entails.[86]

**B. Unconstitutionally Defective Instructions to the Jury**

In admitting, over petitioner's objections, the "Korean war documents" and other prejudicial but irrelevant evidence as proof of incitement, error was committed which would be fatal to petitioner's conviction even if it had not been compounded by subsequent developments at the trial. Petitioner unsuccessfully moved for a mistrial and then, seeking to mitigate the prejudicial affect of these documents, unsuccessfully requested instructions to the jury which would have clarified the essential nature of satisfactory proof of incitement by eliminating some of the evidence which was clearly irrelevant and exceedingly prejudicial.[87]

The trial judge denied this instruction on the ground (Tr. 1937) that "it in effect selects certain portions of the evidence . . . for accentuation by this Court." But the requested instruction did not seek to accentuate but to eliminate evidence which could not be validly used to establish incitement, and therefore this ground of rejection was inapplicable and erroneous.

On argument at the last term, Mr. Justice Frankfurter suggested that the court's refusal to give the requested instruction was correct unless it be the affirmative duty of a trial judge in the federal courts to assist the jury by charging not only in general terms concerning the legal issues, but by specific comment on the significance and bur-

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[86]Pet. Br. pp. 36-39; Pet. Rep. Br. pp. 4-5.
[87]Pet. Br. pp. 35-36; Pet. Rep. Br. pp. 4-5.

den of the evidence. Statements that the federal trial judge does indeed have such a duty are to be found in the decisions of this Court. In *Nudd et al.* v. *Burrows, Assignee,* 91 U. S. 426,[88] Mr. Justice Swayne wrote (91 U. S. at 439):

> ". . . it is the right and duty of the court to aid them [the jury] by recalling the testimony to their recollection, by collating its details, by suggesting grounds of preference where there is contradiction, by directing their attention to the most important facts, by eliminating [sic: illuminating?] the true points of inquiry, by resolving the evidence, however complicated, into its simplest elements, and by showing the bearing of its several parts and their combined effect, stripped of every consideration which might otherwise mislead or confuse them. How this duty shall be performed depends in every case upon the discretion of the judge."

This viewpoint is, however, qualified by the principle of broad discretion in the trial judge, and it has several times been said or held that he has no affirmative duty to discuss the evidence in detail. *Stilson* v. *United States,* 250 U. S. 583, 588; *Allis* v. *United States,* 155 U. S. 117, 124; *Todorow* v. *United States,* 173 F. 2d 439, 446 (9th Cir.); *United States* v. *Long,* 153 F. Supp. 528, 531 (W. D. Pa.). In *United States* v. *Cohen,* 145 F. 2d 82 (2d Cir.) Judge Learned Hand declined to reverse a conviction on the appellant's urging that the trial judge should have discussed the facts in his charge to the jury, and said (145 F. 2d at 92):

> "Moreover, it would not have been humanly possible to do so without either making serious slips, or of seeming to favor one side or the other. It is possible that there may be judges who could safely do so—Lord Cockburn summed up the Tichbourne Case for a week or more—but it is beyond the

[88] See also *Heller* v. *United States,* 104 F. 2d 446, 450 (4th Cir.).

> powers of all but the merest few, assuming that there are any who can do it. And, whatever may be the rule across the water, in this country not only has the exercise of the power never been obligatory but the power itself has been somewhat suspect."

If Judge Hand's analysis suggests the alarming thought that juries must be entrusted with tasks which judges cannot safely attempt, it is none the less true that a trial judge's failure to comment extensively on the evidence has not often, if ever, been held in this country to constitute reversible error. But, whatever might be the preferable practice when the jury is confronted with an enormous record and complicated issues of fact to be determined under closely-reasoned principles of law, this question is not the issue presented in the present case.

For the trial judge's error below did not lie within the range of discretion. Petitioner did not request general comment on the sweep or detail of the evidence. He requested specific instructions on the legal sufficiency of certain evidence to prove the essential element of incitement by the Communist Party, and an exclusionary instruction to be applied to evidence which had been erroneously admitted for that purpose but was plainly irrelevant and improper for that purpose. (R. A-33-34). Petitioner requested an instruction that incitement could not be found on the basis of this legally insufficient evidence alone. Such instructions should certainly have been given under the rule long ago laid down by Chief Justice Taney in *M'Niel* v. *Holbrook*, 12 Pet. 84, 88:

> "The question submitted to the court was a question of law; and turned upon the legal sufficiency of evidence of a certain description, to establish a particular fact. And whether it was legally sufficient for that purpose or not; or whether the law required higher or different evidence; was a question for the court, and not for the jury."

In the present case, the law does require "different" (if not "higher") evidence of incitement from that upon which the government so heavily relied before the jury. It was the duty of the trial judge to make clear the relation between the issue and the proof, and to forestall the possibility of a conviction based on irrelevant evidence. Squarely in point is *Grunewald* v. *United States*, 353 U. S. 391, wherein the issue was whether the jury had been adequately instructed with respect to the sufficiency of certain evidence to establish a continuing conspiracy. Mr. Justice Harlan wrote (353 U. S. at 414-15):

> "We thus find that the judge's charge left it open for the jury to convict even though they found that the acts of concealment were motivated purely by the purpose of the conspirators to cover up their already accomplished crime. And this, we think, was fatal error. . . . Under such circumstances, therefore, it was essential for the judge to charge clearly and unequivocally that on these facts the jury could not infer a continuing conspiracy to conceal the conspiracy. . . . Further, it was incumbent on the judge to charge that in order to convict the jury would have to find that the central aim of the conspiracy was to immunize the *taxpayers* from tax prosecution. . .".

Whatever might be urged in justification of the trial judge's initial refusal to give the charge requested below, the necessity became even greater after the prosecution's summing up, in which the jury was invited (R. A24) to examine the most repellent of the Korean war documents and find incitement to action on that basis alone. Thereafter, petitioner renewed his objection to the court's failure to give the requested charge (Tr. 2213), once more unsuccessfully. The case thus went to a jury which had been exhorted to find incitement on the sole basis of evidence which was unrelated to, and insufficient to establish, that element.

The constitutional and statutory flaw in the instructions is precisely analogous to the defect in the charge which was one of the grounds of reversal in the *Yates* case. There, the judge failed to tell the jury that certain evidence offered to prove advocacy of violent overthrow was not sufficient because the advocacy thus established was not of an "action-inciting" type. Under these circumstances, as this Court concluded, it was (354 U. S. at 325) "incumbent on the court to make clear in some fashion that the advocacy must be of action and not merely abstract doctrine." The evidence concerning the Communist Party was, as the Court later concluded, insufficient to establish that the Communist Party engaged in such advocacy, and this evidence had been presented to the jury under instructions which did not make clear its insufficiency.

## CONCLUSION

As stated at the outset, petitioner has not undertaken to reargue in this brief all the points on the basis of which reversal is urged. In addition to the constitutional and statutory points directed to the validity of the indictment, petitioner believes that the serious errors in the conduct of the trial, and the insufficiency of the evidence, would in any event require reversal of the judgment of conviction.

However, petitioner has now been twice tried on the basis of an indictment challenged on grounds upon which this Court has not yet passed. Other cases under the membership clause pending here on petition for certiorari and in the lower federal courts[89] present the same basic issues of constitutionality and the legal sufficiency of the indictments. Under these circumstances, petitioner respectfully suggests that the constitutional and statutory questions should now be resolved.

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[89]Pet. Br. p. 14, footnotes 4, 5 and 6.

In conclusion, petitioner states below his answers to the questions posed in the Court's order of June 29, 1959:

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| Question (1). | Answer: | No. |
| Question (2). | Answer: | No, with respect to both sentences. |
| Question (3). | Answer: | No, with respect to all sentences and clauses. |
| Question (4). | Answer: | Yes, with respect to the first sentence. With respect to the second sentence, the "doctrine" was not properly applied in this case, but can now be by reversal of the judgment. |
| Question (5). | Answer: | Yes. |

August 25, 1959

Respectfully submitted,

TAYLOR, SCOLL & SIMON
400 Madison Avenue
New York 17, New York

SMITH, MOORE, SMITH, SCHELL & HUNTER
Jefferson Standard Building
Greensboro, North Carolina
*Attorneys for Appellant*

TELFORD TAYLOR,
MCNEILL SMITH,
*Of Counsel.*

## APPENDIX A

**Monday, June 29, 1959**

No. 488 SCALES vs. UNITED STATES

It is ordered that this case be set for reargument at the 1959 Term to be heard on Thursday, November 19, 1959. Counsel are requested to address themselves to the following questions among others:

"(1) Is the Membership Clause of the Smith Act, 18 U. S. C. § 2385, valid under the Constitution of the United States if it be interpreted to permit a conviction based only on proof that the accused was a member of a society, group or assembly of persons described in the Act knowing the purposes thereof?

"(2) If not, is the Membership Clause constitutionally valid if interpreted as also requiring proof that the membership was accompanied by a specific intent of the accused to accomplish those purposes as speedily as circumstances would permit? Does the Smith Act permissibly bear such an interpretation?

"(3) If the Membership Clause would not be constitutionally valid as interpreted under (1) or (2), would the clause be constitutionally valid if interpreted as requiring as an element of the crime proof that the accused was an 'active' member? Does the Smith Act permissibly bear such an interpretation? If not, and if the clause be valid without such element, does a constitutional application of the Membership Clause depend upon any such requirement, and if so was such a requirement properly applied by the courts in this case?

"(4) Whether the 'clear and present danger' doctrine, as interpreted by counsel, has application

to the Membership Clause, either with respect to the accused or with respect to the 'society, group, or assembly of persons' described in the statute. If applicable, whether such doctrine was or can now be, properly applied in this case.

"(5) Is § 4(f) of the Internal Security Act, 50 USCA 780, a bar to the present prosecution? Counsel are requested to discuss the relevance of the registration provisions of that Act to this question."

Two hours are allotted to each side for oral argument.

## APPENDIX B

18 U. S. C. Section 2385 (the Smith Act):

Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officers of any such government; or

Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety or overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group or assembly of persons, knowing the purposes thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

2. 50 U. S. C. Section 783 (the Internal Security Act of 1950):

(a) It shall be unlawful for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship, as defined in paragraph (15) of section 782 of this title, the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization, or foreign individual: *provided, however,* That this subsection shall not apply to the proposal of a constitutional amendment.

* * *

(c) It shall be unlawful for any agent or representative of any foreign government, or any officer or member of any Communist organization as defined in paragraph (5) of section 782 of this title, knowingly to obtain or receive, or attempt to obtain or receive, directly or indirectly, from any officer or employee of the United States or of any department or agency thereof or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, any information of a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States, unless special authorization for such communication shall first have been obtained from the head of the department, agency, or corporation having custody of or control over such information.

* * *

(f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 787 or section 788 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute.

JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

No. 1

JUNIUS IRVING SCALES,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA

## PETITIONER'S REPLY BRIEF ON REARGUMENT

TAYLOR, SCOLL, FERENCZ & SIMON
400 Madison Avenue
New York 17, New York

SMITH, MOORE, SMITH, SCHELL & HUNTER
Jefferson Standard Building
Greensboro, North Carolina
*Attorneys for Appellant*

TELFORD TAYLOR,
MCNEILL SMITH,
*Of Counsel.*

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IN THE

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OCTOBER TERM, 1960

JUNIUS IRVING SCALES,
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No. 1

## PETITIONER'S REPLY BRIEF ON REARGUMENT

In response to the Court's order for reargument of this case,[1] the government has taken positions, with respect to both the statutory question (the scope of the immunity provided by Section 4(f) of the Internal Security Act) and the constitutional questions, which are certainly more extreme than those it has espoused hitherto. Now the Court is advised[2] by the government that Congress may constitutionally proscribe membership in the Communist Party even on the part of those who wish "to divert the organization from its existing unlawful program" or whose sole motive is the enactment of social legislation. So, too, the government suggests[3] that the "clear and present dan-

[1]Order of June 29, 1959, set forth in Petitioner's Supplemental Brief on Reargument (hereinafter cited as "Pet. Rearg."), Appendix A. Petitioner's Brief and Reply Brief previously filed are cited respectively as "Pet. Br." and "Pet. Rep. Br." The government's initial Brief is cited as "Govt. Br." and its Brief on Reargument as "Govt. Rearg."

[2]Govt. Rearg. pp. 7-8.

[3]Govt. Rearg. pp. 29-31.

ger" standard may now be scrapped "... where Congress has dealt directly with aspects of speech, as it has here ...", at least if there is specific intent to bring about what is advocated.

It is hardly surprising that these propositions are put forward with some diffidence, and with no apparent confidence that they will win the approval of this Court. Essentially if not formally, the government's arguments are the same as those previously advanced. No attempt is made to imbue Section 4(f) of the Internal Security Act with any meaningful content, and no serious effort to support the constitutionality of the membership clause as Congress enacted it, without the additional language with which the government hopes to shore it up.

The government's brief is notable for its extensive reliance on arguments constructed and developed in disregard of circumstances which, once noted, are destructive of its position. Thus, for example:

(1) The government persists in describing Section 4(f) of the Internal Security Act as limited to "mere" or "naked" membership, an interpretation which is totally inconsistent with the presence of the words "the holding of office" in the statutory language.

(2) The interpretation of "member" in the membership clause as meaning only "active" (as well as "high-level", "quasi-military", etc.) membership is indefensible, once attention is given to the fact that the clause also covers one who "affiliates" with a subversive organization.

(3) The argument for judicial interpolation of specific intent in the membership clause is advanced without regard for Congress' amendatory insertion of knowledge only, after prolonged consultation with the Solicitor General and others who knew full well how

to require specific intent, if that had been the legislative purpose.

These and a few related matters are discussed in the remainder of this brief.

*I. Section 4(f) of the Internal Security Act.* In its several briefs in this case the government has repeatedly asserted that Section 4(f) grants immunity from prosecution only on the basis of "mere" or "naked" membership "without more."[4] But in examining the meaning of the expression "per se" on which the government relies, the first place to look is at the language of Section 4(f) itself, and this immediately yields the information that its coverage is not restricted to "membership" but also embraces "the holding of office". By its own explicit language, therefore, the statutory immunity extends beyond "mere" or "naked" membership, and applies to members engaging in the activities of, and possessing the knowledge which may normally be attributed to, officers of the Communist Party.

The government strongly relied on the petitioner's office-holding as proof of his guilty knowledge,[5] and takes the position that[6] "'. . . office holding, as we admit, is itself 'strong evidence' of knowledge of the Party's aims.'" If that is so, the immunity granted by Section 4(f) is at least coextensive with the elements of the crime of membership as defined in the membership clause. Belatedly struggling with this inevitable inference, the government is forced to argue[7] that Congress extended the immunity to Communist officers "even though it believed it [the exemption] would have little or no application", because "no harm would be

[4] *E.g.* Govt. Br. pp. 30, 70, and 74.
[5] Govt. Br. p. 85.
[6] Govt. Reargt. p. 36.
[7] *Id.*, pp. 36-37.

done by exempting such a person (*i.e.*, the ignorant official) from the criminal law and it might help to sustain the constitutionality of the Internal Security Act."

The government suggests no reason why "the holding of office" should be given so restricted and unreal a meaning, and advances no justification for the consequent frustration of Congressional intent. It is true, as the government states[8], that Section 4(f) is an immunity-from-prosecution, not an exemption-from-registration, provision. But, as the government acknowledges[9], the purpose of the immunity grant is to "bolster" the validity and efficacy of the registration provisions of the Internal Security Act, by removing the basis for their obstruction by pleas of self-incrimination.

Whether or not Section 4(f), construed in accordance with its language in the light of the Congregational purpose, is sufficient to accomplish that purpose, is not the question.[10] This Court has squarely and unanimously rejected the argument that a Congressional grant of evidentiary protection should be narrowly construed because of its insufficiency for constitutional purposes. *Adams* v. *Maryland*, 347 U. S. 179; see also *United States* v. *Bryan*, 339 U. S. 323, 337.

In enacting Section 4(f), Congress intended to exempt Communist Party officers and members from prosecution under the membership clause, and to require that accusations under the other provisions of the Smith Act and of the Internal Security Act be based on charges of conduct, other than membership, proscribed as criminal therein. The Internal Security Act in general and Section 4(f) in particular embody a Congressional decision to deal with Communist office-holding and membership by registration rather

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[8] *Id.*, pp. 35-36.

[9] *Id.* p. 35.

[10] *Cf. Communist Party* v. *Subversive Activities Control Board*, No. 12 at the current term of Court.

than prosecution. The government has shown no reason why this Court should not give effect to that decision by ordering the dismissal of this indictment for failure to state an offense.

2. *Unconstitutionality of the Membership Clause.* The government seeks to draw this case under the constitutional umbrella of the *Dennis* case by describing[11] the membership clause and the "organizing" proscription of the Smith Act as "two parallel provisions" which cannot "have different constitutional results." This argument confuses proximity with similarity. The "organizing" provision punishes the individual for his own participation in the forbidden advocacy by organizing a group that engages in it. The membership clause makes the accused criminally liable for the advocacy of others, and is unconstitutional because, under the due process clause, membership is too remote an association to warrant imposing criminal responsibility for the conduct of other members[12], and under the First Amend-

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[11]Govt. Rearg. p. 20.

[12]The government suggests (*Id.* p. 10 note 6) that *Whitney* v. *California*, 274 U. S. 357, supports the imposition of criminal liability for membership in a subversive organization, based on the assumption that the "present serious crimes" referred to in Mr. Justice Brandeis' concurring opinion (274 U. S. at 379) were, in the government's words, "acts of the Party to which the petitioner was connected through her membership."

But Justice Brandeis' opinion expressly states (*Ibid.*) that the "serious crimes" were not those of the Communist Labor Party, of which Miss Whitney was a member, but of the International Workers of the World, and the record clearly discloses that the crimes which the Justice had in mind were such things as the spreading of incendiary bombs and poison on farms and emery dust in factories. The majority opinion in the *Whitney* case emphasizes (274 U. S. at 363-66) that Miss Whitney was chairman of the credentials committee and a member of the resolutions committee at the Communist Labor Party's organizational convention in California. That Party's program included an endorsement of the "revolutionary" activities of the I. W. W., and Miss Whitney herself was in close contact with members of the I. W. W. who had been arrested on charges of criminal

ment, membership in a group (absent a charge of conspiracy) is conduct too far removed from the forbidden advocacy to constitute a clear and present danger. The circumstance that the membership clause and the organizing provision are adjacent and grammatically connected is, of course, irrelevant.

Although the questions in the Court's order of June 29, 1959 have now obliged the government to take a formal position in support of the constitutionality of the membership clause as it is written, the brief still relies chiefly on the amendatory limitations previously proposed. These include not only the proposed new elements of specific intent (charged in the indictment) and "activity" (not so charged) of which the Court has taken cognizance in its order for reargument, but also the other qualifications suggested by the government, both in its initial presentation ("purposive", "rigidly disciplined", "high level", "quasi-military", and "deeply conspirational")[13] and on reargument ("dedicated", "full-time", and "proselytizing").[14]

As petitioner has previously pointed out,[15] this is simply an effort on the government's part to redeem the constitutional inadequacy of the statute and the indictment, by stressing what the record is supposed to show about the petitioner individually. In its latest brief, the government even argues that this is a proper method of constitutional analysis.[16]

It is of course true that the Court tests the constitutionality of criminal statutes in terms of the case that presents itself, and not of "some hypothetical case" or of "some

activity. See the Brief of Defendant-in-Error on Rehearing in No. 3, October Term, 1925, pp. 9-14. Therefore, Miss Whitney's connection with the "present serious crimes" was not solely as a "member" of the Communist Labor Party, but as an organizer of a group and participant in a meeting that advocated those crimes.

[13]Gov't. Br. pp. 48-49, 52-53, and 56; Pet. Rep. Br. pp. 2-3.

[14]Gov't Rearg. p. 27.

[15]Pet. Rep. Br. p. 3 note 6.

[16]Govt. Rearg. pp. 26-28.

other individual not before the Court."[17] But this does not mean that a statute, unconstitutional on its face, may be saved because a constitutional statute might be drawn if limited to facts such as those thought to have been proved in the particular case.[18]

The government's struggle for an artificially limited interpretation of the membership clause, like its similar effort to restrict Section 4(f) of the Internal Security Act, is waged in defiance of the language itself. One may read all of the government's briefs in this case without encountering discussion of the fact that the clause covers not only a "member" of but also one who "affiliates with" a subversive group.[19]

It is true, of course, that the constitutionality of the membership clause insofar as it proscribes affiliation is not now before the Court. But that does not mean that this phrase may be overlooked when the construction of the clause as a whole is in question. Since Congress intended to punish affiliation, it plainly did not intend its prohibition of membership to be limited in ways that could not possibly apply to affiliation.

The term "affiliates" as used in a criminal statute no doubt approaches if it does not cross the line of fatal imprecision.[20] Plainly, however, it was intended to cover a

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[17] *Id.* p. 27.

[18] Pet. Rearg. pp. 4-11. If in *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, the defendant had charged twenty dollars instead of twenty cents for a pound of sugar, that would not have rescued the statute there in question, even though a constitutional statute suffiicently describing conduct such as that supposed might readily have been drawn by adding qualifications and specifications to the statute before the Court. See *Trop* v. *Dulles*, 356 U. S. 86, 118 (Mr. Justice Frankfurter, dissenting): "Rigorously as we are admonished to avoid consideration of constitutional issues if statutory disposition is available, it would do violence to what this statute compelling conveys to draw from it a meaning other than what it spontaneously reveals."

[19] Pet. Rep. Br. pp. 3-4; Pet. Rearg. p. 21.

[20] *United States* v. *Reimer*, 79 F. 2d 315, 317 (C. A. 2); *Inland Steel Co.* v. *National Labor Relations Board*, 170 F. 2d 247, 262 (C. A. 7).

looser and lesser degree of connection than membership.[21] Equally plainly, it comprehends a lesser amount of organizational activity than does membership.[22] It is inconceivable, therefore, that Congress intended the word "member" to be limited by qualifying adjectives such as those that the government has constantly employed in this proceeding.[23]

In its argument that specific intent to overthrow the government should be read into the membership clause,[24] the government continues to ignore the fact that Congress added to the membership clause, by amendment to the bill that became the Smith Act, the requirement of knowledge of the organization's unlawful purposes. As previously indicated,[25] the purpose of the amendment was to avoid earlier interpretations of comparable state statutes in which the element of *mens rea* had been deemed unnecessary. This limitation being thus assured by specific amendment, it cannot be convincingly argued that the more stringent and un-

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[21]See *Bridges* v. *Wixon*, 326 U. S. 135, 143: "Affiliation . . . imports . . . less than membership but more than sympathy."

[22]In *Bryson* v. *United States*, 243 F. 2d 837 (C. A. 9), which arose under the Taft-Hartley law, the court declined to say whether "member" as used in the Smith Act requires "activity", but observed (243 F. 2d at 839) that: "Affiliation is a relationship which can exist even when not manifested by activity."

[23]The government appears to have embraced the view of the Court of Appeals for the Ninth Circuit that "affiliation" does not necessarily involve activity. See the Solicitor-General's Brief in Opposition to the petition for certiorari in *Bryson* v. *United States* (No. 1065, October Term 1956) p. 13.

[24]The government again invokes the *Whitney* case (Govt. Rearg. pp. 9-10 and 15) to support its argument that the membership claim is constitutional *without* specific intent. But its analysis will not bear comparison with the majority opinion in the case which, dealing with Miss Whitney's contention that she did not personally favor violence, said (274 U. S. at 367-68) that the issue of her intent was not open to review in this Court, that it was foreclosed by the verdict, and that her contention ". . . entirely disregards the facts . . . " showing her unlawful intent.

[25]Pet. Rearg. pp. 13-14 and 17-18.

usual requirement of specific intent may be derived from the language by implication.[26]

Even if specific intent were to be added to the membership clause by judicial amendment, its constitutionality would not be strengthened. The government continues to argue[27] that the charge here is substantially the same as the conspiracy charge in the *Dennis* case, on the theory that subversive intent coupled with Party activity is the equivalent of the agreement to pursue an unlawful objective in concert, which is the core of a criminal conspiracy.[28]

The government's view finds no support in the decisions of this Court, and has recently been rejected by the Council of the American Law Institute which, after consideration of this specific point, decided that "agreement" should remain, as it always has been, the essential element of conspiracy.[29] Unlawful purpose coupled with activity in support of those pursuing it may be the basis for a charge of complicity in or attempt to commit the substantive offense, but is insufficient to support a charge of conspiracy.

The government's argument[30] that even lawful Party activity aids the Party's illegal purposes, and therefore may be treated as an element of the crime charged here, is directly contrary to *De Jonge* v. *Oregon*, 299 U. S. 353. Lawful

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[26]Compare the language of the "membership clause" of the Communist Control Act of 1954 (50 U. S. C. 843, Pet. Br. 5a), which includes the phrase "knowingly and willfully".

[27]Govt. Br. pp. 47-56; Govt. Rearg. pp. 20 and 23.

[28]The government's reliance (Govt. Br. pp. 49-50; Govt. Rearg. 29-30) on Mr. Justice Jackson's concurring opinion in the *Douds* case (339 U. S. 382, at 431-32) is misplaced. Justice Jackson did not say, as the government suggests, that a charge of Communist Party membership is equivalent to a charge of conspiracy. He said, rather, that members of the Communist Party might be "chargeable, on ordinary conspiracy principles, with responsibility for . . . the party's program." That is precisely the charge in the *Dennis* case, and is precisely not the charge in the present case.

[29]The American Law Institute, Model Penal Code, Tentative Draft No. 10 (May 6, 1960) pp. 19-20, 108-109 (wherein the views of the late Judge Parker as stated in the opinion in this very case, 227 F. 2d 581 at 587, are rejected), and 116-17.

[30]Govt. Rearg. pp. 23-25.

speech and assembly are protected by the First Amendment even if the organizational auspices are subversive, and the charge here of membership is not significantly different, in First Amendment terms, from the charge which was laid against De Jonge. The government's effort to distinguish the *De Jonge* case[31] on the ground that there the indictment charged no activity other than "his assistance in the conduct of a meeting" is breathtaking, since in the present case the government relies chiefly on "intent", which is not specified in the statute, and "activity", which is specified in neither the statute nor the indictment.[32]

October 3, 1960

TAYLOR, SCOLL, FERENCZ & SIMON
400 Madison Avenue
New York 17, New York

SMITH, MOORE, SMITH, SCHELL & HUNTER
Jefferson Standard Building
Greensboro, North Carolina
*Attorneys for Petitioner*

TELFORD TAYLOR,
MC NEILL SMITH
*Of Counsel.*

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[31] *Id.* pp. 25 and 28.

[32] In the *De Jonge* case counsel for the appellee (State of Oregon) attempted in this Court to do just what the government attempts in the present case—i.e., to pitch the constitutional issue not on the statute and indictment but on circumstances extraneous to both. In the *De Jonge* case it was urged on this Court (Appellee's Brief, No. 123, October Term 1936, pp. 30-31) that De Jonge, in his speech at the meeting, had discussed the activities of the Young Communist League, urged the audience to attend a Communist meeting the next day in order to show defiance of the police and assist the Communist Party in its revolutionary tactics, and solicited new members for the Communist Party. All these matters lay outside the indictment and were disregarded by the Court, which should equally disregard the government's effort here to bolster the constitutionality of the statute by invoking evidence that the petitioner was "high level", "active", or "proselytizing" or that the Communist Party is "deeply conspirational".

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No. 1

# In the Supreme Court of the United States

OCTOBER TERM, 1959

JUNIUS IRVING SCALES, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES ON REARGUMENT

J. LEE RANKIN,
*Solicitor General,*
J. WALTER YEAGLEY,
*Assistant Attorney General,*
JOHN F. DAVIS,
*Assistant to the Solicitor General,*
KEVIN T. MARONEY,
BRUNO A. RISTAU,
*Attorneys,*
*Department of Justice, Washington 25, D.C.*

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# In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 8

JUNIUS IRVING SCALES, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES ON REARGUMENT

In its order of June 29, 1959, 360 U.S. 924, setting this case down for reargument, the Court specified five questions to which counsel were requested to address themselves, as follows:

"(1) Is the Membership Clause of the Smith Act, 18 U.S.C. § 2385, valid under the Constitution of the United States if it be interpreted to permit a conviction based only on proof that the accused was a member of a society, group or assembly of persons described in the Act knowing the purposes thereof?

"(2) If not, is the Membership Clause constitutionally valid if interpreted as also requiring proof that the membership was accompanied by a specific intent of the accused to accomplish those purposes as speed-

ily as circumstances would permit? Does the Smith Act permissibly bear such an interpretation?

"(3) If the Membership Clause would not be constitutionally valid as interpreted under (1) or (2), would the clause be constitutionally valid if interpreted as requiring as an element of the crime proof that the accused was an 'active' member? Does the Smith Act permissibly bear such an interpretation? If not, and if the clause be valid without such element, does a constitutional application of the Membership Clause depend upon any such requirement, and if so was such a requirement properly applied by the courts in this case?

"(4) Whether the 'clear and present danger' doctrine, as interpreted by counsel, has application to the Membership Clause, either with respect to the accused or with respect to the 'society, group, or assembly of persons' described in the statute. If applicable, whether such doctrine was or can now be, properly applied in this case.

"(5) Is § 4(f) of the Internal Security Act, 50 USCA 780, a bar to the present prosecution? Counsel are requested to discuss the relevance of the registration provisions of that Act to this question."

We have here briefed, or rebriefed, these issues in the order followed by the Court, not attempting to reargue the other issues covered in our brief on the merits submitted last term. For the convenience of the Court, and to avoid referring back and forth between documents, our brief submitted in the 1958 Term

is reprinted in the back of this brief, following the inserted blue page.[1] Therefore, there is included within these covers all of the material on the basis of which we submit the case at this time.

The Smith Act (18 U.S.C. 2385), in its form applicable to this case, provided:

> Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or
>
> Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or
>
> Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

[1] As to the "Jencks Act" discussion (Br. 99–112), this Court's decision in *Palermo* v. *United States*, 360 U.S. 343, substantially disposes of that issue.

> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

In answering the Court's questions, we shall assume in Point I that the statute requires proof of membership with knowledge of the association's aims, without proof of either specific intent or of activity, but subject to the proper application of the constitutional limitation of the "clear and present danger" test as discussed in Point IV. In Point II we assume the elements on which the discussion in Point I is based and add the element of specific intent, but not activity, again subject to the "clear and present danger" limitation. In Point III we assume the elements of Point II plus activity, again subject to the "clear and present danger" limitation. However, for the purpose of analysis, we note that these combinations by no means exhaust the possibilities. The "clear and present danger" doctrine could be considered a separate element and added or left out of each of the other groups. It would also be possible to consider intent and activity as alternative additional elements, rather than considering activity (as we do) only as it is added to intent.

# I

## THE MEMBERSHIP CLAUSE OF THE SMITH ACT IS CONSTITUTIONAL EVEN THOUGH IT BE INTERPRETED TO PERMIT A CONVICTION BASED SOLELY ON PROOF THAT THE ACCUSED WAS A MEMBER OF A GROUP DESCRIBED IN THE ACT, KNOWING THE PURPOSES THEREOF

1. In our previous briefs in this case at the 1956 and 1958 Terms, we have not argued this point, assuming that this Court had construed the membership clause of the Smith Act to require proof of specific intent and that the term "membership" should be limited to active membership (1956 Br. 23, 39–41; 1958 Br. 47–55). Thus, we did not discuss the constitutionality of the clause in the absence of those requirements.

In *Dennis* v. *United States,* 341 U.S. 494, 499, it is stated: "We hold that the statute requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence."[2] Although the opinion had specific reference to the first paragraph of the Smith Act, dealing with teaching and advocating overthrow, and to that portion of paragraph three which deals with organizing a group to teach or advocate such overthrow, the language

[2] The quotation is from the opinion of the Chief Justice, joined by Justices Reed, Burton and Minton. The concurring opinion of Mr. Justice Frankfurter assumes the same construction. 341 U.S. at 518. Mr. Justice Jackson, concurring, and Justices Black and Douglas, in dissent, were silent on the point.

and reasoning of the Court was generally applicable to the entire Act. The membership clause, here involved, is structurally a part of the same paragraph as the organizing clause. We, therefore, understand the Court's decision in *Dennis* to mean that intent to carry out the overthrow of the United States is a part of the offense prescribed. While in *Yates* v. *United States,* 354 U.S. 298, the grounds upon which the case was disposed of made it unnecessary for the Court to reexamine the specific intent required for conviction, assumptions by the Court in its consideration of the sufficiency of the evidence indicate no withdrawal from the position adopted in *Dennis.* See 354 U.S. 298 at 331 and 332. Earlier, the Court had given a similar construction to Section 9(h) of the National Labor Relations Act. *American Communications Ass'n* v. *Douds,* 339 U.S. 382, 406–408.

This case was tried on the premise that a showing of both intent to accomplish the overthrow of the government and active membership were necessary, and we have not asked the Court to consider the case in the absence of those factors. Nor do we do so now, since we continue to believe that specific intent is, under the statute, an essential part of the Government's case and that the proof of activity in this case aids in upholding the conviction either as a matter of construction or of constitutional application (see *infra,* pp. 11–27). Nevertheless, since the Court has asked for discussion of the issue, we submit that there is authority supporting the constitutionality of the provision even if it is applied as requiring neither the specified intent nor actvity beyond mere membership.

2. In the beginning, it is important to keep clear the specific intent which we are discussing. There is no question but that the statute in specific terms requires proof of knowledge of the purposes of the organization. A man is not punished for joining a subversive association in ignorance of its nature; the government must prove that he knew what he was doing. The intent referred to in the Court's question is the defendant's personal intent to carry out the purposes of the organization, a mental attitude going beyond *mens rea,* as that term is used to characterize criminal intent in common law crimes. See *Morissette* v. *United States,* 342 U.S. 246, 250–263. The intent here involved is an intent to overthrow the government of the United States by force and violence.

To test the question, let it be assumed that an individual with full knowledge of the objectives of the Communist Party becomes a member with no intention of aiding in bringing about a revolution, but because he believes action through the Party is the most effective way to secure social legislation, or public ownership, or a labor-conscious administration.[3] Let it be assumed further that no specific

[3] A harder case is involved if the individual not only does not intend that the objective shall be attained, but has the specific intent to divert the organization from its existing unlawful program. In such a case, it might well be unreasonable to construe the statute as applying to a person whose intent was entirely consistent with the Congressional purpose, at least until the failure of the individual's efforts had become clear. Cf. *Whitney* v. *California,* 274 U.S. 357, discussed *infra,* pp. 9–10.

activity, other than maintaining membership, was proved. There is authority for the proposition that the constitutional protections of free speech and the right to assembly and due process do not prevent Congress from making such membership a crime, even where the member's heart is not in it. This is supportable on the principle that knowingly joining an organization with illegal objectives contributes to the attainment of those objectives because of the support given by membership itself, and that it is the objective of the organization, not of the individual, which governs.[4]

This Court has infrequently considered the constitutionality of laws proscribing membership, but, where it has, it has upheld their validity without regard to such specific intent or to activity. In *Bryant* v. *Zimmerman*, 278 U.S. 63, a New York statute, aimed at the Ku Klux Klan, punished membership in certain oath-bound associations which had failed to register. The Court held that to forbid individual members to attend meetings or retain membership did not violate due process of law.[5] More recently in *N.A.A.C.P.*

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[4] In the present case the trial judge gave explicit instructions to the jury that it must find that the intent of the Communist Party, in addition to the petitioner's own intent, must be to bring about the overthrow of the government by force and violence (R. A 39–A 40).

[5] The petitioner seeks to distinguish the case on the ground that the statute dealt with registration (Pet. Br. 25–26). However, the statutory language was: "Any person who becomes a member [of a secret, oath-bound association] * * *, or remains a member thereof, * * * with knowledge that such corporation or association has failed to comply with any provision of this article, shall be guilty of a misdemeanor." Art. V–A, N.Y. Civil Rights Law, c. 664, Laws 1923, p. 1110, Sec. 56.

v. *Alabama,* 357 U.S. 449 at 465, the Court, in commenting on the earlier case, stated:

> * * * [In *Bryant* v. *Zimmerman*] this Court upheld, as applied to a member of a local chapter of the Ku Klux Klan, a New York statute requiring any unincorporated association which demanded an oath as a condition of membership to file with state officials copies of its * * * [constitution, membership lists, etc.]. In its opinion, the Court took care to emphasize the nature of the organization which New York sought to regulate. The decision was based on the particular character of the Klan's activities, involving acts of unlawful intimidation and violence, which the Court assumed was before the state legislature when it enacted the statute, and of which the Court itself took judicial notice.

Apparently, then, the Court did not feel that the intent or activity of the individual member was essential to the validity of the statute—as applied to that member—which it upheld on the basis that the legislature had authority to regulate such organizations having oath-bound memberships and therefore to punish membership in an organization which had not complied with the statutory requirements.

The information in *Whitney* v. *California,* 274 U.S. 357, encompassed violations of the California Syndicalism Act by reason not only of the defendant's participating in the organization of the California Communist Labor Party, but also her membership in it. One of the issues before this Court was her claim that in fact she personally opposed the illegal aims at

the time of its organization and that they were adopted over her protest. In treating with this claim, the Court, without exploring her own intentions, placed reliance on the fact that she had knowingly retained membership after the aims of the party had become clear. The majority of the Court, therefore, found nothing inconsistent with the Fourteenth Amendment in punishing knowing membership even without the element of specific intent to carry out the objectives of the association. The concurring opinion of Mr. Justice Brandeis, while differing strongly from the majority of the application of the clear and present danger doctrine, raises no question with respect to punishing membership, even in the absence of intent, if the element of immediate serious danger is satisfied.[6]

As to the Smith Act itself, the Court of Appeals for the Fourth Circuit discussed the membership clause

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[6] The petitioner and the government differ so widely on the meaning and significance of the concurring opinion of Justices Brandeis and Holmes in the *Whitney* case that it is probable that the only way to resolve the difference is to read the statements against the contents of the opinion itself. However, we call to the attention of the Court the fact that Miss Whitney was convicted on count one of the information which charged her with organizing and becoming a member of the Communist Party of California. 274 U.S. 357, 360. Therefore, when the concurring opinion talks about the intent to "commit present serious crimes" (274 U.S. at 379), it must be talking about acts of the Party to which the petitioner was connected through her membership. In this respect, therefore, the case, including the concurrence, supports the position of the government that membership in a subversive organization with knowledge of its aims may constitutionally be made the basis for criminal liability.

in *Frankfeld v. United States,* 198 F. 2d 679 at 683–684, certiorari denied, 344 U.S. 922, saying:

> * * * So far as "membership" in an organization advocating * * * destruction or overthrow [of government] is concerned, such membership is condemned only where there is knowledge on the part of the accused of the unlawful purpose of the organization. Membership in an organization renders aid and encouragement to the organization; and when membership is accepted or retained with knowledge that the organization is engaged in an unlawful purpose, the one accepting or retaining membership with such knowledge makes himself a party to the unlawful enterprise in which it is engaged.

Moreover, the same construction of various state syndicalism laws has been upheld in the state courts. *People* v. *Ruthenberg,* 229 Mich. 315, writ of error dismissed, 273 U.S. 782; *State* v. *Laundy,* 103 Ore. 443, 500; *State* v. *Hennessy,* 114 Wash. 351, 368. And even those state decisions which have construed state syndicalism laws as requiring intent have reached this result, not on the basis of constitutional necessity, but merely as a matter of legislative purpose. *People* v. *Gitlow,* 195 App. Div. 773, 794; *State* v. *Kahn,* 56 Mont. 108; *Commonwealth* v. *Widovich,* 295 Pa. 311.

Therefore, we conclude that there is authority to support the proposition that the elements of intent to bring about the overthrow of the government by force and violence, and of affirmative activity in addition to membership, are not essential to the constitutionality of the membership clause of the Smith Act.

However, as pointed out above, we do not urge the Court to adopt this position since we do not believe it is a correct construction or application of the statute or an issue necessary to be passed upon in view of the record now before the Court.

## II

### THE MEMBERSHIP CLAUSE OF THE SMITH ACT IS PROPERLY INTERPRETED AS REQUIRING PROOF OF SPECIFIC INTENT AND AS SO INTERPRETED IS CONSTITUTIONAL.

1. The first paragraph of the Smith Act (the advocacy clause), *supra*, pp. 2–3, punishes *knowing* or *willful* advocacy of the duty of overthrowing the government by force or violence; the second paragraph (the literature clause) punishes the publication of written or printed matter advocating such overthrow when done with the *specific intent* to cause such a result; the third paragraph comprises both the so-called organizing clause and the membership clause, forbidding respectively the organizing of societies which advocate violent overthrow, and membership in such societies *with knowledge* of the organization's purpose.[7]

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[7] As originally enacted in Title I of the Alien Registration Act of June 28, 1940, 54 Stat. 670, the advocacy clause constituted Section 2(a)(1) of that Act; the literature clause was Section 2(a)(2); and the organizing and membership clauses were contained in Section 2(a)(3) of the Act. In addition, Section 3 of the Alien Registration Act contained a special conspiracy provision. Section 2(a)(1) and the organizing clause of Section 2(a)(3), as originally enacted, were involved in *Dennis* v. *United States*, 341 U.S. 494, since the conspiracy there charged was alleged to have run from April 1, 1945, to July 20, 1948. When the Criminal Code was revised in 1948, the phraseology of Section 2 of the Alien Registration Act was changed to effect consolidation but without any change of sub-

Since the literature clause expressly requires a specific intent to overthrow the government, and because of the absence of precise language calling for a specific intent in the advocacy and conspiracy clauses, it was claimed in *Dennis* v. *United States*, 341 U.S. 494, 499, in an attempt to create a more difficult constitutional issue, that Congress deliberately omitted any such requirement. The Chief Justice indicated that since the *Dennis* defendants had themselves requested a charge with respect to specific intent, under Rule 30 of the Federal Rules of Criminal Procedure they appeared to be barred from raising this point on appeal (341 U.S. at 500, fn. 2); but, nevertheless, he discussed the point because of its importance to the administration of the statute. *Ibid.* In rejecting the contention, he said:

> * * * It would require a far greater indication of congressional desire that intent not be made an element of the crime than the use of the disjunctive "knowingly *or* willfully" in * * * [the paragraph containing the advo-

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stance, the numbering of the individual paragraphs was dropped, and Section 2 was recodified as 18 U.S.C. (1952 ed.) 2385. Section 3 (the special conspiracy provision) was also omitted as covered by the general conspiracy provision of 18 U.S.C. 371. Act of June 25, 1948, c. 645, § 1, 62 Stat. 808. This is the form of the statute as applicable to the instant case.

The statute has since been amended by the Act of July 24, 1956, c. 678, § 2, 70 Stat. 623, to provide for an increase of the maximum fine from $10,000 to $20,000, and an increase in the maximum sentence from 10 to 20 years. In addition, this most recent amendment reinstated as part of 18 U.S.C. 2385 the special conspiracy provision.

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> cacy clause], or the omission of exact language in * * * [the paragraph containing the organizing and membership clauses]. The structure and purpose of the statute demand the inclusion of intent as an element of the crime. Congress was concerned with those who advocate and organize for the overthrow of the Government. Certainly those who recruit and combine for the purpose of advocating overthrow intend to bring about that overthrow. *We hold that the statute requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence.* [Citing cases.]
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> Nor does the fact that there must be an investigation of a state of mind under this interpretation afford any basis for rejection of that meaning. * * * The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence. [341 U.S. at 499–500; emphasis added.]

It is in the face of this explicit holding that the petitioner argues that the membership clause should not be construed as requiring specific intent. It is true that the membership clause itself was not in issue in *Dennis,* but its reasoning is nonetheless compelling here.

The attempt of the petitioner to distinguish between the construction of the organizing clause and the membership clause, insofar as reading into them a requirement of specific intent is concerned (Pet. Supp. Br. 15–17), is not convincing. There would seem to be

quite as much intent implicit in joining an organization with full knowledge of its purposes, which have already been established, as there is in organizing an association the aims of which may not have been fixed.[8] In fact, in *Whitney* v. *California,* 274 U.S. 357, where this Court upheld the validity of a conviction under the California law without reference to the specific intent of the defendant (*supra,* pp. 9–10), it appears that the Court read more legal significance into Miss Whitney's continued membership in the Communist Labor Party of California after the organization was completed and the aims of the party defined than it did in her participation in its organization.

It seems clear that in reading intent into the advocacy and organizing clauses in *Dennis* the Court contemplated the same interpretation for the Act as a whole. Such an interpretation is supported by all the cases in which the Court has followed the long-established practice of favoring an interpretation which, not only supports constitutionality, but avoids serious constitutional issues. However, two are particularly pertinent here.

In *Screws* v. *United States,* 325 U.S. 91, the Court was faced with the problem of construing a provision of the Civil Rights Act which made it a crime to de-

[8] The petitioner paraphrases the organizing clause as forbidding the organizing of groups "to" advocate the overthrow of the government (Pet. Supp. Br. 16). The language of the paragraph makes illegal the organization of any group "who" advocates such overthrow. Therefore, there is nothing specific in the language to require the element of intent which the Court found was implied.

prive a person of any rights guaranteed him by the due process clause of the Fourteenth Amendment. The opinion of Mr. Justice Douglas, upholding the constitutionality of the Act, was based on a construction that the Act required a specific intent to deprive a citizen of his constitutional rights. Thus the Court avoided the very type of constitutional problem which the petitioner seeks to inject in this case. Similarly, in *American Communications Ass'n* v. *Douds*, 339 U.S. 382, where the Court was dealing with the non-Communist affidavit requirement of Section 9(h) of the National Labor Relations Act, belief in the overthrow of the government by force was interpreted to require specific intent to accomplish such a result, rather than a mere abstract feeling that such a process was inevitable. Thus again, the Court, by construction, upheld a statute which would otherwise involve a serious constitutional issue. The same should be done here.

2. Construing the membership clause to require a specific intent to bring about the violent overthrow of the government serves two important functions. Firts, it precludes the statute's application to membership in organizations in order to participate in abstract or academic discussions of the idea of revolt. Second, it precludes its application to membership in an organization where the individual—though aware of the unlawful purposes of the organization—does not believe or desire that complete overthrow can or should be attained, but participates in order to reach intermediate goals short of that goal and perhaps entirely legal in themselves. In the present case, the specific

intent and purpose of the petitioner is so obvious as to obscure the importance of that factor in closer cases (1958 Br. 85–88). In borderline cases, however, construing the clause to require a specific intent would be of crucial importance for it provides both juries and judges with an adequate means to prevent the application of the Act to persons who in no way contribute to the dangers with which Congress was concerned. Cf. *Hartzel* v. *United States*, 322 U.S. 680, a World War II prosecution under the Espionage Act of 1917, where this Court reversed the conviction because of the paucity of evidence respecting the requisite specific intent of the defendant. Dissenting from the majority conclusion, Mr. Justice Reed, with whom Justices Frankfurter, Douglas and Jackson joined, said:

> * * * The right of free speech is vital. But the necessity of finding beyond a reasonable doubt the intent to produce the prohibited result affords abundant protection to those whose criticism is directed to legitimate ends. [322 U.S. at 694.]

Justices Holmes and Brandeis appear to have considered that a specific intent to produce prohibited evils is a substitute for, or equivalent to, a "clear and present danger" that speech will produce such evils, at least in those cases where the latter "test" applies. Although we do not concern ourselves under this point with the "clear and present danger" doctrine as such (see *infra*, pp. 28–32), we advert to it insofar as a specific intent requirement has relevancy to that subject. Justice Holmes suggested this inter-relation in

*Schenck* v. *United States,* 249 U.S. 47, 52, when he said: "If the act (speaking, or circulating a paper), its tendency and *the intent with which it is done* are the same, we perceive no ground for saying that success alone warrants making the act a crime" (emphasis added). And he developed the idea at some length in his dissenting opinion in *Abrams* v. *United States,* 250 U.S. 616, 627–628, as follows:

> I never have seen any reason to doubt that the questions of law that alone were before this Court in the cases of *Schenck, Frohwerk* and *Debs,* 249 U.S. 47, 204, 211, were rightly decided. I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces *or is intended* to produce a clear and imminent danger that will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times.
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> But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil *or an intent to bring it about* that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its

> opinions would hinder the success of the government aims or have any appreciable tendency to do so. *Publishing those opinions for the very purpose of obstructing however, might indicate a greater danger* and at any rate would have the quality of an attempt. So I assume that the second leaflet if published *for the purpose* alleged in the fourth count might be punishable. But it seems pretty clear to me that nothing less than that would bring these papers within the scope of this law. * * * [Emphasis added.]

Almost identical language appears in Mr. Justice Brandeis' concurrence in *Whitney* v. *California*, 274 U.S. 357, 373:

> * * * That the necessity which is essential to a valid restriction does not exist unless speech would produce, or *is intended to produce*, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent has been settled. [Emphasis added.][9]

And this Court has put the matter thus in *Taylor* v. *Mississippi*, 319 U.S. 583, 589–590:

> As applied to the appellants * * * [the Mississippi statute which punished advocacy of refusal to salute the flag] punishes them although what they communicated is not claimed or shown to have been done *with an evil or sinister purpose*, to have advocated or incited subversive action against the nation or state, *or* to

[9] Significantly, in *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 395, the Court quoted with approval this statement of Mr. Justice Brandeis.

have threatened any clear and present danger to our institutions or our Government. [Emphasis added.]

3. When the Act is read to encompass the element of intent, the views expressed in Point I, *supra,* with respect to the constitutionality of the membership clause are reinforced. Actually, the issue would seem foreclosed by the *Dennis* case itself. It is difficult to see how these two parallel provisions, the organizing clause and the membership clause, can, if the same intent is read into each, have different constitutional results.

At the risk of laboring the obvious, it is helpful to re-examine the structure of the Smith Act as a whole. In all its paragraphs, it is explicitly aimed at "advocacy" of overthrow of the government by force or violence. The first paragraph strikes at direct advocacy by an individual; the second at responsibility for publications which advocate the illegal action; the organizing clause deals with organizing an association which engages in such advocacy; and the membership clause outlaws knowing affiliation with an organization so engaged. All sections, including the conspiracy provisions now re-enacted into the law (see fn. 7; *supra,* p. 12), deal with direct or indirect advocacy of overthrow. It is difficult to argue that knowing membership in an illegal enterprise with intent to carry out its purposes is too tenuous a connection between the individual and the advocacy to form a basis for liability while organizing, conspiring, or publishing for the same ends may be punished. (See also 1958 Br. 48–56.)

These views were well expressed by District Judge Kraft in *United States* v. *Blumberg*, 136 F. Supp. 269, 271 (E.D. Pa.):

> However defendant vigorously maintains that the means by which this power [to prohibit acts intended to effect the violent overthrow of Government] is carried into execution by the membership clause of the Smith Act are not appropriate or plainly adapted to the end of protecting the Government from armed rebellion. Defendant concedes that a conspiracy to organize a group who advocate violent governmental overthrow may constitutionally be made a crime. *It would be strange logic, indeed, to hold that an agreement to organize such a group may be made criminal, but that membership in the group organized pursuant to such a conspiracy, with knowledge of its purposes, may not be made a crime.* [Emphasis added.]

## III

### THE CONSTITUTIONALITY OF THE MEMBERSHIP CLAUSE IS FURTHER FORTIFIED BY THE REQUIREMENT THAT THE MEMBERSHIP BE ESTABLISHED AS ACTIVE MEMBERSHIP, AND THIS REQUIREMENT IS REASONABLY TO BE INCLUDED EITHER AS A MATTER OF STATUTORY CONSTRUCTION OR AS A CONSTITUTIONAL LIMITATION ON THE APPLICATION OF THE ACT

1. The first sentence in the Court's questions about this issue (*supra*, p. 2) asks whether the constitutionality of the membership clause would be aided by adding the requirement of proof that the membership is active. An indication of the answer to this ques-

tion is found in the petitioner's repeated assertions that there was no charge that the petitioner performed any act whatever (Pet. Br. 3) or engaged in any Party activity (Pet. Br. 24); that the indictment charges nothing more than a state of mind (Pet. Br. 25); that there is absent from the charge an allegation of agreement or participation (Pet. Supp. Br. 31); and other picturesque ways of laying a foundation for the argument that under our law guilt must be brought home to an accused by reason of his individual action. To the petitioner it is clearly a strong point that conviction under the membership clause does not require a showing of activity of any kind.

It was to meet this false premise that the element of "active membership" was first explicitly introduced into the case through the government's supplementary memorandum after the first argument. (Gov't Supp. Memo. on Reargument, Nos. 3 and 4, October Term, 1957). But all along, the case had been briefed and argued by the Government on the theory that membership was not a passive state, but an affirmative support of the aims and purposes of the organization. (Gov't Br. in *Scales* v. *United States*, No. 3, October Term, 1956, pp. 23, 41.) We had also pointed out that, with respect to the Communist Party, membership was, under its rules, active membership. (*Id.*, p. 42; *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 431–432.)

The necessity of establishing active membership, either to meet a reasonable construction of the word "membership", or, alternatively, as a constitutional

limitation on the application of the Act, does help in upholding its constitutionality. This is so even though the activity be expended along lines not otherwise illegal, since active support of any kind aids the organization in achieving its own illegal purposes. The solicitation of membership, the contribution of financial assistance, or the handling of public relations all help the organization and therefore indirectly promote its objectives. In an army there must be not only fighters, but also suppliers, and transporters and medical aides. Any activity which contributes to the ultimate success of the undertaking bears its share of responsibility for that outcome.[10]

The trial court in this case gave a severe definition of what was necessary to constitute active membership, stating (R. A–41):

> On the other hand, if you believe beyond a reasonable doubt that the Communist Party was such a group or society, then you should next consider whether the defendant, Scales, was an active member of, or affiliated with, the Party with knowledge of its aims and purposes. The defendant admits that he was a member of the Party. For his membership to be criminal, however, it is not sufficient that he be simply a member; it must be more than a nominal, passive, inactive, or purely technical membership. In determining whether he

[10] In the comparable situation with respect to the nature of overt acts necessary to sustain a conviction for conspiracy, this Court recently held that the acts need not themselves be illegal. *Yates* v. *United States*, 354 U.S. 298, 334. See also *Pierce* v. *United States*, 252 U.S. 239, 244; *United States* v. *Rabinowich*, 238 U.S. 78, 86; *Braverman* v. *United States*, 317 U.S. 49.

> was an active or inactive member, consider how much of his time and efforts he devoted to the Party. To be active he must have devoted all, or a substantial part, of his time and efforts to the Party. Moreover, to be criminal, the activities of the membership and knowledge of the Party aims and purposes must have existed within the period from November 18, 1951, to November 18, 1954.

This hard standard for activity can be accepted for this case since the jury found that it was met. Except for purposes of analysis, it is not necessary to consider the quantity or quality of petitioner's activity; acting as chairman of the Communist Party of North Carolina for an extended period of time, recruiting and instructing new members, and participating in special Communist schools, must certainly suffice in both particulars. It is the case before it, involving the activities of this petitioner, on which the Court must pass judgment, not some hypothetical set of facts which may never arise. In *McComb* v. *Frank Scerbo & Sons, Inc.*, 177 F. 2d 137, 141 (C.A. 2), Judge Frank stated, "I think it always unwise for a court to cross hypothetical constitutional bridges; crossing actual ones is dangerous enough." See *Fleming* v. *Rhodes*, 331 U.S. 100, 104; *Blackmer* v. *United States*, 284 U.S. 421, 442.

Requiring a showing of active membership not only meets any due process objection on the ground of personal responsibility, but it also takes the strength out of the argument that the membership clause runs afoul of the First Amendment. If all that was involved were bare membership, or bare membership

plus some attendance at Party meetings, there would be more foundation for the argument that freedom of speech and of the right of assembly was impaired. Cf. *De Jonge* v. *Oregon*, 299 U.S. 353, finding unconstitutional the provision of the Oregon syndicalism law forbidding presiding at or assisting in conducting a meeting of a certain type of organization. This argument disappears when the requirement of activity is added.

Therefore, the answer to the first branch of the Court's question is that adding the element of activity does aid in sustaining the constitutionality of the membership clause whether that element is incorporated as a matter of interpretation or as a test of constitutional application (akin to the "clear and present danger" test).[11]

2. The second question posed by the Court in this part of its reargument order is whether the statute can properly be construed to require proof of active membership. An affirmative answer to this does not mean that activity must be alleged as a separate element of the crime, as the petitioner suggests (Pet. Supp. Br. 19). Rather, an allegation of membership in the indictment must mean membership in the sense

[11] The element of activity is pertinent to a jury's consideration of a case under the membership clause, not only because of the question of construction, but also because the defendant's activity is one of the best ways of proving his intention, a factor which, as we point out above, should be part of the government's burden of proof. Two of the state cases emphasize this significance of evidence of a defendant's activity. *People* v. *Lloyd*, 304 Ill. 23, 87–89; *Shaw* v. *State*, 76 Okla. Cr. 271, 310.

in which Congress used the term and it then becomes a matter of instructions to the jury as to what that term requires in the way of proof. This is analogous to the Court's reading of additional meaning into the word "belief" in the National Labor Relations Act, as it did in *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 407, or the word "wilfully" in *Hartzel* v. *United States*, 322 U.S. 680, 686–687.

The propriety of interpreting the membership clause to include the requirement of activity is supported not only by the policy of construing statutes so as to avoid questions of constitutionality (*supra*, pp. 15–16), but also by specific holdings of this Court giving a similiar interpretation to comparable words in other statutes. In *Galvan* v. *Press*, 347 U.S. 522, it was determined that Congress in providing for deportation on the basis of membership in the Communist party intended something more than "nominal" membership. 347 U.S. at 527. See also *Rowoldt* v. *Perfetto*, 355 U.S. 115. *Galvan* follows the earlier decision in *Bridges* v. *Wixon*, 326 U.S. 135, where the term affiliation was construed to require a working alliance. And both of these decisions follow the district court decision in *Colyer* v. *Skeffington*, 265 Fed. 17, 72 (D. Mass.), reversed on other grounds *sub nom. Skeffington* v. *Katzeff*, 277 Fed 129 (C.A. 1).

3. But, whether or not the concept of activity is comprehended within the word "membership", in any event it is a proper consideration for the courts, either trial or appellate, to apply in determining whether the statute is constitutional in its impact on particular cases. Just as in the application of the

"clear and present danger" principle a court must decide whether in the individual case the application of the restriction on speech is really necessary to avert serious peril to the country, so here a court should, even if it doubts that an application to a passive communist would be constitutional, consider its constitutionality as applied to a dedicated, full-time, proselytizing communist. If the Act would be constitutional as so applied, then the only question remaining would be whether the various applications are separable. (See also 1958 Br. 65–66.)

Many times this Court has stated that it will not upset an act of Congress because in some hypothetical case the law could have an unconstitutional application. See, *e.g. Steamship Co.* v. *Emigration Commissioners,* 113 U.S. 33, 39; *Yazoo & Miss. R.R.* v. *Jackson Vinegar Co.,* 226 U.S. 217, 219; *Fleming* v. *Rhodes,* 331 U.S. 100. And again the Court has said that it will consider only the case as it affects the petitioner, not some other individual not before the Court. *Blackmer* v. *United States,* 284 U.S. 421; *Virginian Ry. Co.* v. *Federation,* 300 U.S. 515; *United States* v. *Wurzbach,* 280 U.S. 396. Sometimes, the issue has been stated in terms of whether Congress intended the statute to continue to be enforced in one application, if it is held unconstitutional in some other application. *Dorchy* v. *Kansas,* 264 U.S. 286; *The Abby Dodge,* 223 U.S. 166; *National Labor Relations Board* v. *Jones & Laughlin,* 301 U.S. 1. On this issue of separability, as in other questions of construction, the Court will adopt a construction, if it sees its way clear to do so, which will save the Act rather than

destroy it. *United States* v. *Rumely,* 345 U.S. 41; *Ashwander* v. *T.V.A.,* 297 U.S. 288.

Therefore, the answer to the final portion of this third question, is that, wholly apart from statutory construction, there is here a constitutional application of the statute to a defendant whose activity in the Communist cause would meet the strictest test conceivable. Whatever its application to other cases, the Act is constitutional in its present application.[12]

## IV

### THE "CLEAR AND PRESENT DANGER" TEST AS APPLIED TO THE MEMBERSHIP CLAUSE AND TO THIS PARTICULAR CASE SUSTAINS THE CONSTITUTIONALITY OF THE CONVICTION

1. Exhaustive consideration was given to the application of the "clear and present danger" doctrine to the Smith Act in *Dennis* v. *United States,* both in the Court of Appeals, 183 F. 2d 201, and in this Court, 341 U.S. 494. Although both courts recognized that applications of the test had not been consistent through the years, it was concluded that the test was applicable to the Smith Act, or at least to the conspiracy provision of the Smith Act, and the main opinion in this Court specifically accepted Judge

[12] Of all of the state and federal cases cited by both parties to this case in this field, none deals with a factual situation where the accused was not shown to be active in some official capacity in carrying out the aims of his organization. Even in the *De Jonge* case, 299 U.S. 353, the conviction was thrown out, not because De Jonge had not been an active member of the party, but because the indictment alleged only his assistance in the conduct of a meeting.

Hand's formulation of it in relation to the Smith Act. 341 U.S. at 510. In *Yates* v. *United States,* 354 U.S. 298, there was no withdrawal from that position. Although fine lines of distinction have been drawn in applying the test, we had not thought that there was sufficient distinction between the offense proscribed by the membership clause, as properly construed, and the conspiracy, advocacy, or organizing clauses to justify asking the Court to reconsider the matter. Therefore, in the trial of the case and in our prior presentations to this Court we have assumed that the rule applied here as it did in *Dennis* (1958 Br. 66).

2. However, since the Court has invited reconsideration of the matter, it is appropriate to re-examine the application of the test in the light of this particular case.

Certainly, there is support in the majority opinions in *Gitlow* v. *New York,* 268 U.S. 652, and in *Whitney* v. *California,* 274 U.S. 357, for the proposition that where Congress has dealt directly with aspects of speech, as it has here in proscribing direct or indirect advocacy of violent overthrow, the issue is properly one of whether the Congressional determination of the necessity of such restriction is reasonable and, if it is, there is no occasion to apply the "clear and present danger" test to the individual case. If this is the proper rule, there is now no real issue as to the reasonableness of Congress's action in forbidding the type of advocacy outlawed in the Smith Act, since this Court has in other contexts upheld Congressional authority with respect to participation in the type of organization here involved. See the concurrence of

Mr. Justice Frankfurter in *Dennis* v. *United States*, 341 U.S. 494, 546–552; Mr. Justice Jackson in *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 424–433; *Barenblatt* v. *United States*, 360 U.S. 109, 127–128. However, in this particular case, if the Court adheres to the position of the main opinion in *Dennis*, the existence of a clear and present danger from participation in the Communist Party at the present stage of our history, as reviewed in our 1958 brief, pp. 75–88, 121–139, supports the application of the Act to this case as fully as the corresponding facts before Congress justified it in making its legislative judgment.

There is, however, one aspect of the case which was not specifically referred to in *Dennis* and which supports the view that, if the statute be given the construction which we urge in earlier sections of this brief, there is no necessity for the application of the "clear and present danger" test at all. If we are right in our contention that the statute requires proof of a specific intent to carry out the aims of the organization to bring about the overthrow of the government by force and violence (*supra*, pp. 11–21), then, even under the strictest views of Justices Holmes and Brandeis, this illegal intent dispenses with the occasion for the additional qualification that the danger be immediate. This goes back to the theory of *Fox* v. *Washington*, 236 U.S. 273, which held that the right of free speech does not include the right to incite actual breaches of the law. Certainly the overthrow of the government by force and violence is illegal and it seems that intentional activity to stir

others to accomplish that end comes within the rule of the *Fox* case. The Court of Appeals for the Fourth Circuit, in dealing with a case under the membership clause that followed the *Dennis* case (*Frankfeld* v. *United States*, 198 F. 2d 679, 684, certiorari denied, 344 U.S. 922), stated:

> The defendants contend that these provisions [literature and membership clauses] of the statute are unconstitutional because they do not require a "clear and present danger" as a condition of criminality; but it would be little short of absurd for a statute to forbid advocacy of the destruction of the government or membership in an organization formed for the purpose of such advocacy only in the event that they result in "clear and present danger". This would be to make the near-success of an attempted crime the criterion of criminality for making the attempt.

We suggest, therefore, that if the Court does desire to reconsider the applicability of the "clear and present danger" doctrine to the Smith Act, it should consider whether, if the statute is properly construed to require specific intent and activity, there remains any need for the additional limitation based on the probabilities of success. It is too late to doubt that it is entirely appropriate to punish an individual for deliberately attempting an illegal act, even where his realistic chances of accomplishing it are uncertain, or even slight. *United States* v. *Quincy*, 6 Pet. 445, 465; Sayre, *Criminal Attempts*, 41 Harv. L. Rev. 821.

3. It is our view that if the "clear and present danger" doctrine is applicable at all to this case, it is to be applied with regard to the danger to be anticipated

from the Communist Party rather than from the individual membership of this particular petitioner. It would be the same as writing the Act off the books to require that the government prove that it is in danger of overthrow from the activity of any individual. This petitioner's membership is his contribution to the common end, and it is his membership, plus that of his associates, that gives the Party power. Nominal, *pro forma,* membership by itself might well be held to be no contribution at all; but once the statute is interpreted or applied as we have suggested there remains no question but that the "danger" test is to be applied to the organization. This has been the uniform practice in this type of case. *Gitlow* v. *New York,* 268 U.S. 652; *Whitney* v. *California,* 274 U.S. 357; cf. *American Communications Ass'n* v. *Douds,* 339 U.S. 382.

We have no doubt that the "clear and present danger" test, properly applied in this case, upholds the conviction of the petitioner.[13] That the peril is real has been attested by the experience of this and other nations which have been subject to infiltration by such organizations from within. See 1958 Br. 39–45. That

[13] Since the "clear and present danger" doctrine is a test of constitutionality in the application of restraints on speech, not an element of the offense to be proved in making out a case, it is clear that the determination is a question of law to be decided by the trial court if the question is raised before it and to be reviewed by the appellate courts. Therefore, the proper test can now be applied by this Court on the basis not only of the record in the particular case but also of all of the facts of which the Court may take judicial notice. *Dennis* v. *United States,* 341 U.S. 494, 514.

the peril is sufficiently immediate to justify governmental restrain is attested by the sensitive international situation which has resulted in the country's living in a state of emergency year after year. There is no reason for the Court to blind itself to a world situation of which Congress, the Executive, and the public generally are fully conscious.

## V

### SECTION 4(F) OF THE INTERNAL SECURITY ACT DOES NOT BAR PROSECUTION UNDER THE MEMBERSHIP CLAUSE OF THE SMITH ACT[14]

In the course of repeated briefing and argument of this case, the petitioner has become so entangled in the ultimate purposes and the Congressional history of Section 4(f) of the Internal Security Act (50 U.S.C. 783(f))[15] that he appears to have forgotten what it actually does. What it does is to modify subsections (a) and (c) of the same section and to amend all other criminal statutes dealing generally or specifically with offenses arising out of association with the Communist Party as though there were read into each of them the language of Section 4(f). The Smith Act can now be

[14] See also pp. 68–74 of our 1958 brief.

[15] The provision reads:

"Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 787 or section 788 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute."

read as though it included an additional paragraph reading "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of this Section." The question we have is whether active membership with knowledge of the aim of the Party and with specific intent to carry out those aims is "membership per se". The court below held not, and so have all other federal courts which have had the issue before them. *Lightfoot* v. *United States,* 228 F. 2d 861, 870–871 (C.A. 7), reversed on other grounds, 355 U.S. 2; *United States* v. *Blumberg,* 136 F. Supp. 269, 273 (E.D. Pa.); *United States* v. *Noto,* 262 F. 2d 501, 508 (C.A. 2); *United States* v. *Hellman* (D. Mont., Cr. 3722, decided June 16, 1958). They reach this result because neither the language nor the purpose of Section 4(f) indicates any other result.

The language of Section 4(f) does not apply to this case because the specific use of the term "per se" bars it. Obviously, this provision was included in the Internal Security Act in order that the very facts making registration necessary under that Act would not in and of themselves constitute a federal crime. To constitute a violation of any federal criminal statute, Congress said, there must be something more. And there is something more in the provisions of the membership clause, namely, knowledge of the intent of the organization, and, under the decision in the *Dennis* case, specific intent to carry out the aims of the Party. This is not membership per se.

The question then arises, if Congress did not believe that either the Smith Act or any other statute pun-

ished membership per se, why did it write Section 4(f) into law? The answer is that through this device Congress hoped to bolster the validity of the registration provisions. (See 1958 Br. 70–72.) If by registering one confessed all of the elements of a federal offense, he could well argue that the requirement of registration was a plain violation of the privilege against incrimination. So Congress specifically recited that the bare fact leading to registration, *i.e.*, membership, is not per se a crime. When, or if, individual Communists are required to register under Section 8 (which will occur only when the Party fails to register) it is possible that they may still argue that the registration requirement is unconstitutional because it requires them to incriminate themselves on an essential element of a crime (even if not the whole crime). It will be time enough to meet that problem when it arises. But if these Communist members are successful in that plea, the result will be invalidation of that portion of the Internal Security Act, not the repeal of the Smith Act.[16]

The petitioner has repeatedly made the argument that, as we interpret the provision, registration will be required only of Communists who do not know the objectives of the Party. (Pet. Br. 48; Pet. Supp. Br. 37.) But Section 4(f) does not relieve any one

[16] Implied repeal of the membership clause of the Smith Act would not obviate the problems inherent in the registration provisions. Individual Communists would still argue that registration compels incrimination with respect to other clauses of the Smith Act, as well as other federal legislation, *e.g.*, the sedition laws. See *Blau* v. *United States*, 340 U.S. 159.

at all of the necessity of registration. The fact that only Communists with knowledge and intent are the subject of prosecution under the Smith Act and that naive Communists, if there are any, are completely secured from such prosecution, does not at all mean that only the naive Communists are required to register under the Internal Security Act. Perhaps the sophisticated Communists may object on the ground of self-incrimination, and, if so, the courts will have to decide that issue when it arises. The petitioner's fault is to read Section 4(f) as though it dealt with the necessity of registration rather than with susceptibility to criminal prosecution. It is at this point that he loses contact with the present case.

The petitioner would also support his argument by the fact that Section 4(f) provides not only that membership per se shall not be a crime but that holding of office shall likewise not per se be criminal. He argues that office holding, as we admit, is itself "strong evidence" of knowledge of the Party's aims. This, we suppose, leads to the conclusion that it will be rare indeed that one can find a Communist official who is ignorant of the aims of the Party. It seems unlikely that Congress really believed that there would be instances of this. But, in effect, Congress has said that it would take no chances in drafting this legislation; no harm would be done in exempting such a person (*i.e.*, the ignorant official) from the criminal law and it might help to sustain the constitutionality of the Internal Security Act. Therefore, Congress could

write in the exemption even though it believed it would have little or no application.

We do not assume from the fifth question in the Court's order that it desires a general discussion of the constitutionality of the registration provisions of the Internal Security Act at this time. However, we refer the Court to *Shapiro* v. *United States*, 335 U.S. 1, and *United States* v. *Sullivan*, 274 U.S. 259, for holdings relating to the authority of the federal government to require records and reports which may in fact serve as a link in establishing a criminal act. It may well be that Congress had these decisions in mind when it determined to go ahead with registration of Communist organizations.

## CONCLUSION

For the reasons stated in our 1958 brief as supplemented above, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

J. LEE RANKIN,
*Solicitor General.*
J. WALTER YEAGLEY,
*Assistant Attorney General.*
JOHN F. DAVIS,
*Assistant to the Solicitor General.*
KEVIN T. MARONEY,
BRUNO A. RISTAU,
*Attorneys.*

OCTOBER 1959.

No. 488

# In the Supreme Court of the United States

OCTOBER TERM, 1958

JUNIUS IRVING SCALES, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES


**J. LEE RANKIN,**
*Solicitor General,*
**J. WALTER YEAGLEY,**
*Acting Assistant Attorney General,*
**KEVIN T. MARONEY,**
**PHILIP R. MONAHAN,**
*Attorneys,*
*Department of Justice, Washington 25, D.C.*

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# In the Supreme Court of the United States

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No. 488

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## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The opinion of the Court of Appeals (R. 455–495)[1] is reported at 260 F. 2d 21.[2]

### JURISDICTION

The judgment of the Court of Appeals was entered on October 6, 1958 (R. 495). The petition for a writ

[1] "R." will be used herein to refer to the printed record. "Tr." will refer to the reporter's transcript, and "G. Ex." to the Government's exhibits.

[2] The opinion of the Court of Appeals affirming the judgment of conviction rendered following petitioner's first trial under this indictment is reported at 227 F. 2d 581, and the *per curiam* opinion of this Court reversing that judgment (on the authority of *Jencks* v. *United States*, 353 U.S. 657, and the Solicitor General's confession of error) is reported at 355 U.S. 1.

of certiorari was filed on November 3, 1958, and granted on December 15, 1958 (R. 496). The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the "membership" clause of the Smith Act (18 U.S.C. 2385) is unconstitutional on its face or as applied to the facts of this case.

2. Whether Section 4(f) of the Internal Security Act of 1950 (50 U.S.C. 783(f))—which provides in part that neither "the holding of office nor membership in any Communist organization by any person shall constitute per se a violation" of that or any other criminal statute—modified, amended, or repealed the "membership" cause of the Smith Act so as to render it inapplicable to this case.

3. Whether the evidence was sufficient to support the verdict.

4. Whether petitioner was denied a fair trial because of

(a) the composition of the grand jury which indicted him;

(b) the legislative findings of fact concerning the Communist Party as set forth in the Internal Security Act of 1950 (50 U.S.C. 781) and the Communist Control Act of 1954 (50 U.S.C. 841);

(c) the application at the trial of the "excision" provisions of the so-called "Jencks" Act, 18 U.S.C. 3500 (directing that, before statements by prosecution witnesses in the Government's possession are turned over to the defense for cross-examination purposes, the court, after *in camera* inspection, excise portions

which do not relate to the subject matter of the testimony of the witnesses); or

(d) the admission of certain evidence offered by the prosecution.

## STATUTES INVOLVED

The Smith Act (18 U.S.C. 2385), in its form applicable to this case,[3] provided:

> Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or
>
> Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or
>
> Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the

[3] The statute has since been amended by the Act of July 24, 1956, c. 678, § 2, 70 Stat. 623, to provide for an increase of the maximum fine from $10,000 to $20,000 and an increase in the maximum sentence from 10 to 20 years. In addition, this most recent amendment reinstated as part of Section 2385 of Title 18 the special conspiracy provision which had been repealed when the Criminal Code was revised in 1948.

overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

The text of the Smith Act, together with relevant provisions of the Constitution of the United States, the Internal Security Act of 1950, the Communist Confrol Act of 1954, the "Jencks" Act (18 U.S.C. 3500), and pertinent statutes concerning the qualifications and the empanelling of jurors (28 U.S.C. 1861, 1864), are set forth in the Appendix to Petitioner's Brief, pp. 1a–9a.

## STATEMENT

On November 18, 1954, petitioner was charged in an indictment (R. A2) returned in the United States District Court for the Middle District of North Carolina with having violated the so-called "membership clause" of the Smith Act, 18 U.S.C. 2385, proscribing being or becoming a member of a society, group, or assembly of persons who teach, advocate, or encourage the overthrow by violence of the Government of the United States, knowing the purposes thereof (*supra*, pp. 3–4). Specifically, the indictment charged him with having been, from in or about January 1946 to and including the date of the filing of the indictment, a member of the Communist Party of the

United States, a society of persons who allegedly teach and advocate the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit," well knowing that the said Party was and is such a society, and "said defendant intending to bring about such overthrow by force and violence as speedily as circumstances would permit" (*ibid.*).

On April 21, 1955, following a trial by jury, petitioner was found guilty and was thereafter sentenced to six years' imprisonment. On November 7, 1955, the Court of Appeals for the Fourth Circuit affirmed the conviction. *Scales* v. *United States,* 227 F. 2d 581. On March 26, 1956, this Court granted certiorari. 350 U.S. 992. On June 3, 1957, following the submission of briefs on the merits and oral argument, this Court ordered the case to be restored to the docket for reargument. 353 U.S. 979. In September 1957, the Government filed a supplemental memorandum which, *inter alia,* pointed out that petitioner was entitled (at least) to a new trial under the rationale of *Jencks* v. *United States,* 353 U.S. 657 (Supplemental Memorandum for the United States on Reargument, Nos. 3 and 4, Oct. Term, 1957, pp. 1-2). On October 14, 1957, this Court, citing the *Jencks* decision, *supra,* entered an order reversing the Fourth Circuit's affirmance of petitioner's conviction "[u]pon consideration of the entire record and the confession of error by the Solicitor General." *Scales* v. *United States,* 355 U.S. 1.

Petitioner was thereafter re-tried and, on February 21, 1958, again convicted and sentenced to six

years' imprisonment (R. A49; Tr. 2217). On appeal to the Court of Appeals for the Fourth Circuit, the judgment of conviction was, on October 6, 1958, affirmed (R. 495). On December 15, 1958, this Court granted certiorari (R. 496).

The evidence adduced at petitioner's second trial may be summarized as follows:

A. GENERAL EVIDENCE (NOT SPECIFICALLY LINKED TO PETITIONER) ESTABLISHING THE CHARACTER OF THE COMMUNIST PARTY AS AN ORGANIZATION WHICH DURING THE INDICTMENT PERIOD TAUGHT AND ADVOCATED THE FORCIBLE OVERTHROW OF THE GOVERNMENT OF THE UNITED STATES AS SPEEDILY AS CIRCUMSTANCES WOULD PERMIT

A mass of evidence was introduced to prove that the Communist Party, during the entire indictment period (1946–1954), taught and advocated the forcible overthrow of the Government of the United States as speedily as circumstances would permit. We set forth in Appendix A, *infra*, pp. 121–139, a summary of so much of this evidence as was not specifically linked at the trial to the petitioner, but directed generally to the character and activities of the Communist Party as an organization knowing membership in which is proscribed by the Smith Act.

B. EVIDENCE, SPECIFICALLY LINKED TO PETITIONER, FURTHER ESTABLISHING THE CHARACTER OF THE PARTY AS AN ADVOCATE OF FORCE AND VIOLENCE; AND SHOWING PETITIONER'S KNOWLEDGE OF THAT CHARACTER AND HIS INTENT WITH RESPECT TO VIOLENT OVERTHROW AT THE EARLIEST FEASIBLE OPPORTUNITY.

Petitioner, commencing in or before 1948, and continuing throughout the indictment period, was the

Chairman of the North and South Carolina Districts of the Communist Party (R. 388–389; Tr. 962, 1585)—the "District" being the largest geographical division in the Party below the national organization itself (R. 66–67; Tr. 279–280). As such, he regularly reported to the National Committee on the activities of the Party in his District and saw to it that the directives of the National Committee were carried out in that area (R. 389; Tr. 1585–86); recruited new members into the Party (R. 257–258; Tr. 1007, 1579); selected and made arrangements for promising Party members to further their education in Marxism-Leninism by attending the Jefferson School of Social Science, which the Party conducted in New York (R. 271–274, 320–323; Tr. 1031–32, 1037, 1039, 1306–1309); received the plaudits of William Z. Foster, the Party's National Chairman, for his work in the Party's behalf in the Carolinas (Tr. 1082); and was the director of a Party training school for "outstanding cadres in the North Carolina area" (R. 396–398; Tr. 1603–1605). On occasion, he privately tutored promising prospective recruits in the fundamentals of Marxism-Leninism (R. 249–252; Tr. 980–995). In December 1951, he disappeared into the Communist underground (R. 307, 334; Tr. 1122–23, 1335–1336). The evidence further showed that petitioner was familiar with substantially all of the basic Marxist-Leninist "classics" which the Government introduced, in supplementation of its proof as adduced through its living witnesses, to show the revolutionary nature and purposes of the Communist Party. Specifically, he was shown to be familiar with the following texts: *Foundations of*

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*Leninism* (G. Ex. 5, Tr. 112; R. 259, 262; Tr. 1010, 1014); *Problems of Leninism* (G. Ex. 42, Tr. 971; R. 262–263; Tr. 1014–1015); *State and Revolution* (G. Ex. 16, Tr. 184; R. 248; Tr. 970–971); *History of the Communist Party of the Soviet Union* (G. Ex. 19, Tr. 213; R. 397–398; Tr. 1604–1605), and *Ten Classics of Marxism* (G. Ex. 114, Tr. 1607; R. 397–398; Tr. 1604–1605).

The evidence summarized below, unlike that summarized in Appendix A (*infra*, pp. 121–139), relates exclusively to petitioner's own statements and actions. In addition to constituting further evidence—supplementing that set forth in Appendix A—of the character of the Communist Party as an organization which advocates the violent overthrow of the Government of the United States at the earliest feasible opportunity, it tends to show petitioner's personal knowledge of, intent with respect to, and activities in furtherance of, the Party's violent revolutionary aims and purposes.

In September 1948, witness Clontz, while a law student at Duke University, wrote to petitioner stating that he was interested in Communism (R. 244; Tr. 961). Petitioner sent Clontz a box of Communist literature and a letter in which he stated that he would be glad to discuss any matter relating to the Party and its activities (G. Ex. 41, Tr. 962–963; R. 245; Tr. 961–962). In that same month, Clontz got together with petitioner at a conference at which petitioner explained to Clontz the Party's basic strategy (R. 248–249; Tr. 980). This meeting was followed by other similar sessions, held from time to time over

the next several years (R. 262, 290–291; Tr. 964, 1014, 1077–78).

There were, petitioner told Clontz, "two classes of people in this country" who "could be used by the Communist Party to foment a revolution" (R. 249; Tr. 981). The first was "the working class or Proletariat," of whom the Communist Party was the leader (*ibid.*). The second was what petitioner termed "the Negro nation," consisting of a "Black Belt" of "thirteen Southern States" (*ibid.*; R. 250; Tr. 986–987). The "basic strategy of the Communist Party," said petitioner, was, by bringing "the working class, led by the Communist Party" and the "Negro nation" together, "to bring about a forceful overthrow of the Government" (R. 249; Tr. 981).

In a discussion which petitioner had with Clontz shortly before Christmas 1948, petitioner told Clontz how Communism would come into power in the United States (R. 246–247; Tr. 967–969). Clontz had suggested that, "with as wonderful a system as communism offered," the Party should "educate the people" as to the benefits of Communism so that "the people would vote in a Communist form of government" (R. 246; Tr. 967). Petitioner "answered that that was completely impossible" and "completely fallacious" because "the Government controlled all of the media of communication, the newspapers, the radio, * * * the institutions of government, including the Army, the police powers, [and] the educational system" (R. 246; Tr. 968). The idea that Communists could convert the masses "by an educa-

tional process," according to petitioner, was "idealism" (*ibid.*). "Idealism," petitioner explained to Clontz (R. 246–247; Tr. 968–969)—

> * * * was a doctrine that Stalin and William Z. Foster had shown to be completely false, that as long as the institutions of government stood and were not overthrown, that ideas could absolutely do nothing.
>
> He [petitioner] said that he and the other followers of Stalin believed that you could use the institutions of government, once you had taken them over, to get across the ideas to the people. But, the defendant said that a militant force would have to force a change in government and at that point he said that is where we come in.

"[I]t would be nice," said petitioner (R. 263–264; Tr. 1017),—

> * * * if revolutionary ideas would automatically produce a revolution. But * * * it was impossible, that a militant force would have to bring about the revolution and that force was the only answer.[4]

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[4] On cross-examination, Clontz was asked if petitioner had not once told him that the Communist Party "does not advocate the overthrow of the United States Government by force and violence. On the contrary, they simply know that the monopolists will soon resort to force to thwart the will of the masses of the workers. When this happens, we will have to meet their force with force" (Tr. 1202–1203). Clontz replied that petitioner had explained the Party's attitude toward force in those terms in their "first meetings," but that he "later explained to me that that was the Communist double talk that was put out for the purpose of misleading * * * people of liberal leanings" (Tr. 1203). "The explanation given by the Party for public consumption," Clontz testified, "was that the

Petitioner, at this meeting, furnished Clontz with Communist Party literature, including Lenin's *State and Revolution* (G. Ex. 16, Tr. 184) and Stalin's *Problems of Leninism* (G. Ex. 42, Tr. 971) (R. 248; Tr. 970–971). In the former of these works Lenin stated that "the liberation of the oppressed class is impossible not only without a violent revolution but also without the destruction of the apparatus of State power * * *" (Tr. 975), and that revolution "is an act in which one section of the population imposes its will on the other by means of rifles, bayonets, cannon * * *"; the Paris Commune[5] was used as an example (Tr. 975–976). Clontz testified that petitioner told him that one of the reasons why he should read Communist Party literature was that it would "help prepare [him] for the time when the Communist Party would call on [him] in time of crisis" (R. 313; Tr. 1151-1152).

In July 1949, petitioner showed Clontz the dedication of a book, *Twilight of World Capitalism,* by William Z. Foster, the Party's National Chairman, in which Foster stated that his great grandson "would live in a Communist U.S.A." (R. 250–251; Tr. 993). Petitioner "told me [Clontz] that there was a depres-

way the revolution would come about was that the people would vote in a Communist regime, at which time the capitalists would bring the armies and the police powers to overthrow the people's government and at that time the people's workers would meet force with force" (*ibid.*). This, however, Clontz was told by Party initiates, including petitioner, was merely "one of the formulations used by the Communist Party to conceal their actual methods, their actual purpose and their actual beliefs" (Tr. 1203–1204).

[5] See Appendix A, *infra*, p. 129.

sion coming, * * * that Communists would suffer probably more than anyone else in the * * * depression, but that they actually reveled in the depression because it gave them an opportunity to reach people that during prosperous times they couldn't even reach, and Scales remarked that if a depression came, William Z. Foster's grandson wouldn't have to wait so long * * * [f]or the revolution" (R. 251; Tr. 993-994).

In November 1949, petitioner told Clontz that he had "the definite feeling" that it would not be long before "things would pop" in this country (R. 251-252; Tr. 994-995). He "explained the basis for his feeling" by saying that he (R. 252; Tr. 995)—

> * * * just had been reading in some book which he didn't identify, the writings of Lenin back in 1917 and 1918; he said that the situation in Russia in that particular time and in the United States, in 1949, was a direct analogy. He said that Lenin had pointed out in his writings around the first part of the year that the Communists were a minority, that they were outnumbered, that they were weak, but that Lenin had still expressed hope.
>
> He said that Lenin had pointed out in July of that same year the Communists were outlawed, the Bolshevik Party, that is, were outlawed, and driven completely underground. Yet, he said, Lenin had pointed out that that very next October was the famous Russian October Revolution. Scales said that he saw exactly the same analogy here. Scales said that he did not foresee a bloody revolution soon, but

that it would come inevitably exactly as it had in the Soviet Union.

On January 17, 1950, petitioner officially received Clontz into the Communist Party as a secret member-at-large (R. 257–258; Tr. 1007). He told Clontz that he would continue his "private tutoring" of Clontz as a member-at-large and instructed him to continue his Marxist-Leninist studies, with "particular emphasis" on Stalin's *Foundations of Leninism* (R. 259; Tr. 1009–1010). In addition, at or about that time, petitioner gave Clontz "an outline" of *Foundations of Leninism* which he told Clontz he had "personally prepared" (R. 262; Tr. 1014). Thereafter Clontz would from time to time study the outline and the book and "would meet to recite to [petitioner], who in turn would give me the correct Party interpretation of those particular things" (*ibid.*).[*]

In February 1950, while petitioner was continuing to give Clontz private instructions to prepare him for future work in the Party and possibly to form an underground cell in Charlotte, North Carolina, Clontz asked him when he thought the "revolution" would come (R. 259–260; Tr. 1011). Petitioner replied that, while he did not think it would come in the immediate future, he "could say definitely that [Clontz'] daughter, who then was fourteen months old, would

[*] In *Foundations of Leninism*, one of the basic Marxist-Leninist "classics," Stalin taught, among other things, that "The dictatorship of the proletariat cannot arise as the result of the peaceful development of bourgeois society and of bourgeois democracy; it can arise only as the result of the smashing of the bourgeois state machine * * *" (G. Ex. 5, p. 54). Repudiating with Lenin the "possibility of the peaceful evolu-

marry in a Socialist or Communist United States"[1] (*ibid.*).

Following this discussion, petitioner and Clontz were joined by Bernard Friedland, the District Organizer for the Party in North and South Carolina (R. 260–261; Tr. 1012). In petitioner's presence Friedland questioned Clontz extensively concerning his background and reasons for joining the Communist Party (R. 261; Tr. 1013). He asked Clontz "why as an attorney [he] had not sought out reform, to reform the system, if [he] felt that the system of government we had was wrong" (R. 262; Tr. 1013–1014). Clontz (R. 262; Tr. 1014)—

> replied to Friedland that Scales had taught me that the entire court system, the entire system of justice in this country was so completely evil that only by overthrowing the whole government and doing away with it could we ever have justice * * *.

This answer "apparently satisfied" Friedland and petitioner (*ibid.*).

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tion of bourgeois democracy into a proletarian democracy" in "England and America" (*id.*, pp. 55–56), he stressed that "the law of violent proletarian revolution, the law of the smashing of the bourgeois state machine" was "an inevitable law" in all "imperialist countries," including the United States, and proclaimed that Lenin was "right in saying" that "The proletarian revolution is impossible without the forcible destruction of the bourgeois state machine" (*id.*, p. 56).

Elsewhere in the same work, Stalin defined "Strategy" as "the determination of the direction of the main blow of the proletariat at a given stage of the revolution * * *" (*id.*, p. 90; read to jury at Tr. 1027).

[1] Petitioner used the terms "communism" and "socialism" interchangeably in his conversations with Clontz (R. 266; Tr. 1020–1021).

In March 1950, at another study and discussion session, petitioner "brought to [Clontz'] attention" the following passage from Stalin's *Problems of Leninism* (R. 263; Tr. 1016):

> Can such a radical transformation of the old Bourgeois order be achieved without a violent revolution, without the dictatorship of the Proletariat? Obviously not. To think that such a revolution can be carried out peacefully within the framework of Bourgeois democracy, which is adapted to the rule of the Bourgeoisie, means that one has either gone out of one's mind and lost normal human understanding, or has grossly and openly repudiated the Proletarian revolution.

Petitioner "pointed out this particular passage as simply proving * * *, as he already had taught, that education and reform would accomplish absolutely nothing, but that revolution, a violent revolution was the only possible way to bring about a change in the form of government" (*ibid.*).

At this same session, petitioner, referring to another passage from *Problems of Leninism,* told Clontz that "this contained the explanation of why a revolution would be easier here" than it had been in Russia (R. 264; Tr. 1018). Whereas "in the Soviet Union there had been no one to help the Soviet Party," petitioner explained (R. 264–265; Tr. 1018–1019),—

> * * * in this country when the revolution started, we would have the benefit of the help from the mother country, Russia, in bringing about our own revolution, because part of the purposes of the Communist Party in the Soviet

> Union was international in scope and that we naturally would continue to receive help in all circumstances from the Soviet Party when the revolution was started here in this country.

Clontz asked petitioner (R. 265; Tr. 1019)—

> * * * what kind of help we would expect. I asked him whether troops were going to be landed or just exactly how we would get help.

Petitioner replied that "we could not expect the Soviet Union to land troops to start our revolution," since "experience had taught the Communists that that sort of approach was disastrous" (*ibid.*). He cited the Communists' experience in China, where, when the Russian Communist Party, originally, "sent in Russian generals," "the Chinese Communists had been licked completely" (*ibid.*). The "new approach"—which had resulted in the successful Chinese Communist Revolution under Mao-Tse-Tung, who "had never even been to Russia"—was for the Russian Communist Party to send "military leaders" and "professional revolutionaries" to assist native Party leaders in "bringing about their [own] revolution" (R. 265; Tr. 1019–1020). Consequently, said petitioner, "we Communists in this country would have to start the revolution, and we would have to continue fighting it" (R. 265; Tr. 1019). On the other hand, he pointed out, "we could count on drawing on the experience of the Soviet Union," which "would furnish us when the revolution came with experienced revolutionaries from Russia" (R. 265; Tr. 1020). "[O]ne thing" that was "certain," petitioner said, was that (R. 266; Tr. 1020)—

> * * * if the United States declared war on the Communists in their revolution, then the Soviet Union would land troops, and * * * that would be a bloody time for all.

Also at this meeting petitioner told Clontz that there was a "basic difference" between the Communist Party and "labor unions" (R. 266; Tr. 1020). Labor unions, he said (*ibid.*)—

> didn't have the advantage the party had, of being able to see beyond the next hill. * * * [A] labor union could only see to the next hill, whereas the Communist Party could see all the way over and could see the ultimate goal, the Communist Party United States.

In June 1950, petitioner made arrangements for Clontz to attend the Jefferson School of Social Science in New York, which he described as "patterned after a National Party School he had attended" (R. 271; Tr. 1031–1032). He told Clontz he would have to use an alias while at the school, since "no communist going up to New York to this school from out of the state registered under their right names" (R. 273–274; Tr. 1037–1038). On August 5, 1950, Clontz left for New York to begin his studies, which lasted approximately three weeks (R. 274; Tr. 1045, 1055). During the second and third weeks, Clontz was privately tutored by Doxey Wilkerson, the Director of Curriculum and liaison officer between the school and Communist Party headquarters (R. 297; Tr. 1055, 1101). (Wilkerson's statements to Clontz as to the Party's position with respect to the use of force and violence in achieving its objectives are summarized in

Appendix A at pp. 134–137, *infra*.) On his return to North Carolina, Clontz discussed in detail the teachings of the Jefferson School with petitioner and Henry Farash, the Party Organizer for North and South Carolina, who worked under petitioner's immediate supervision (R. 293, 300; Tr. 1081, 1106–1107). Clontz read to them his notes on the subject matter of his classes, "showed them the various diagrams, such as the formula for force and violence [see *infra*, pp. 135–136], and commented to them how much more effective the presentation was with the various charts that Doxey Wilkerson had used" (R. 293; Tr. 1081). Clontz "agreed with them that it was the same thing they'd been teaching me, but that I felt it was a little better taught at the Jefferson School because of the better teaching aids that they had there" (*ibid.*).

At the same meeting, petitioner and Farash discussed Clontz' future Party assignments with him; it was decided that Clontz would continue on as a secret Party member and eventually become a member of an Underground Club which was to be organized (R. 292; Tr. 1079–1080). In September 1951, petitioner discussed with Clontz the Party's plans for setting up an underground means of communication (R. 301–302; Tr. 1111–1113). He told Clontz that the Party "was growing more and more like an iceberg with a tenth of it or a hundredth of it above the surface but the vast majority of it hidden and concealed underground" (R. 303; Tr. 1113). In December 1951, petitioner himself was ordered by the national Party headquarters to go underground (R. 307–308; Tr. 1123, 1126). However, he continued to

serve as Chairman of the Party's Carolina District until at least as late as the time of his arrest under the indictment in this case (see Tr. 1519, 1532).

Government witness Reavis testified that in May 1949 he attended the Jefferson School of Social Science, the Party-operated school in New York City concerning which Clontz also testified (*supra,* pp. 17–18) (R. 320–331; Tr. 1306–1331). Reavis, like Clontz, attended the School at the suggestion of petitioner (R. 320–321; Tr. 1306–1307), who gave him detailed security precautions and instructions as to "where to go in New York, and who I was to call for, and what I was to do in case of an emergency" (R. 322–323; Tr. 1308–1309). At the School, Reavis received further precautionary instructions designed to safeguard his "own security" and the "security of the school" (R. 330; Tr. 1330). For example, the students "were told not to all leave the building as a group," "to go in ones and twos to lunch," to put any books they must carry "in newspapers," not to "talk to people" they lived with, etc. (R. 330; Tr. 1330–1331).

Government witness Childs testified that in October 1950 he was invited by Farash, the Party District Organizer for North and South Carolina, on behalf of petitioner, to become a Party member (Tr. 1578–1579). Two weeks later he was received into the Party, and was assigned by petitioner to work in and try to recruit members for the Labor Youth League (R. 387–388; Tr. 1580–1581, 1584), the Party's youth arm (R. 381; Tr. 1560). Childs purchased from petitioner on this occasion a quantity of Party litera-

ture, including Stalin's *Problems of Leninism* (G. Ex. 6, Tr. 116) (Tr. 1584–1585).

In July 1952, Childs, who was at that time an employee of the Western Electric Company in Winston-Salem, showed petitioner a pamphlet, entitled *Our Own Communists Can Cripple Us,* which the Company had placed in one of its reading racks for its employees to read (R. 392–393; Tr. 1596–1597). Petitioner, after examining the pamphlet, told Childs that "we should keep a list of the authors of these books and shoot them some day" (R. 393; Tr. 1597).

Also on this occasion petitioner urged Childs, who had indicated that he was "planning to return to school",[8] to "stay at Western Electric" and become a "leader among the workers" there (R. 393–394; Tr. 1597). Indicating that the Party was "expect[ing] a crisis" in the near future, when it was thought that "things would * * * come to a head," petitioner told Childs that it was more important from the Party's standpoint that he "remain in the industry" and "gain the road of leadership among the broad mass" of the workers than that he complete his education (R. 393–394; Tr. 1597–1598). In this connection he told Childs that "we did not want the Red Army to have to liberate us, meaning by that * * * that if the Communist Party does not have a broad mass able to lead a broad mass of the people in a revolution, then * * * these leaders of the revolution will be placed in

[8] Childs had been enrolled in High Point College from 1948 to 1950, quitting at the end of his second year to go to work (Tr. 1544). In September 1952, he entered the University of North Carolina, where he was still a student at the time of his testifying (Tr. 1545).

the jail and then it will be necessary for the Russian Army or the Red Army to come to the United States to liberate these leaders" (R. 394; Tr. 1598). "The trade unions," petitioner further told Childs in this conversation, "are the schools of revolution" (R. 395; Tr. 1600).

In August 1952, Childs was selected by petitioner to attend a "Party training school for outstanding cadres in the North and South Carolina and Virginia Districts of the Communist Party" (R. 396–399; Tr. 1603–1605). Petitioner was the director of the school (R. 398; Tr. 1605), which was conducted on the farm of a Party member at Walnut Cove, near Winston-Salem (R. 400; Tr. 1609). The students at the school were subject to strict security precautions (R. 398; Tr. 1605). False names were assumed, and no one was permitted to tell other Party members where he was going, make telephone calls, send or receive mail, or leave the school before it was over (Tr. 398, 400–401; Tr. 1605, 1609).

Childs was instructed by petitioner to bring with him to the school copies of the *History of the Communist Party of the Soviet Union* (G. Ex. 19, Tr. 213) and *Ten Classics of Marxism* (G. Ex. 114, Tr. 1607) (R. 397–398; Tr. 1604–1605). The students were assigned readings in these Marxist-Leninist classics, which were later discussed by the group (R. 403–407, 417; Tr. 1613–1618, 1631–1632).

Among the subjects discussed at the school was "how to Bolshevize" the Party (R. 417; Tr. 1632). Bob Handman, the District Organizer for the Virginia District, led the discussion on "Party building" (R. 424; Tr. 1663). He taught that the role of the

Party is to lead the masses in a "broad coalition" resulting in the "overthrow of the capitalist government" (R. 425; Tr. 1664). One of the weaknesses which prevented the Party from attaining this goal, he said, was the insufficiency of its industrial concentration program, *i.e.*, the program of infiltration of key industries and plants by Party members for the purpose of forming Party cells and controlling the unions in such industries (R. 425–427; Tr. 1664–1667). Nothing was said at the school, Childs testified, concerning any need for the Communist Party to become a "majority party" in order to attain its goal (R. 426; Tr. 1666). Handman, in the presence of petitioner, once gave a demonstration of jujitsu, and also demonstrated "how to kill a person with a pencil" (R. 432; Tr. 1680). Stating to those present that they "might be able to use this on a picket line," he demonstrated a method of thrusting a wooden pencil through a person's chest or throat (R. 432; Tr. 1680–1681).

Petitioner once "arranged a private meeting between the staff of the school and" Childs, the purpose of which was again to emphasize to Childs that, rather than return to college, he should retain his job with Western Electric (R. 429–430; Tr. 1671–1672). The staff pointed out to Childs that "the Party program was industrial concentration" and that it was essential that he "remain in industry" in order to "keep a contact with the broad masses of the people" (R. 430; Tr. 1671).

At a party which was held at the conclusion of the Walnut Cove School, petitioner said that there would

be "socialism" in this country by the time that the "grandchildren" of one of the persons present—who then had children ranging in age from ten to four—were born (Tr. 1674–1675). A feature of the party was a cake with a "great big red star" on it, prepared by the wife of the owner of the farm where the School was held, who remarked at the party that "that would be a good time for the F.B.I. to come in" (Tr. 1673).

In the spring of 1953, at a meeting of a Party Club which Childs attended at the home of a Party member named Betsy Van Camp (Tr. 1689), petitioner accused Betsy of being "confused" about "the purpose of a Communist Party Club" (Tr. 1692). "[T]he Party Club," he said, "is not for just the Bourgeois Revolution but for the ultimate Proletariat Revolution" (*ibid.*).

## SUMMARY OF ARGUMENT

### I

The membership clause of the Smith Act is valid on its face and as applied in this case. Under the principles enunciated in *Dennis* v. *United States*, 341 U.S. 494, and reaffirmed in *Yates* v. *United States*, 354 U.S. 298, there is no basis for the contention that, while Congress could punish conspiracy to organize a group which, like the Communist Party of the United States (as shown by the evidence in this case), advocates the violent overthrow of this Government in the sense of a call to forcible action, it was powerless to proscribe knowing, purposive, active—and here, high-level—membership in such a group from which alone the

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organization derives its power to work towards the accomplishment of its violent objective.

A. *Validity of the clause on its face.*—1. The familiar history which was before the Court in *Dennis*—and see Mr. Justice Jackson's concurring opinion in *American Communications Assn.* v. *Douds,* 339 U.S. 382, 422, *et seq.*—gave solid ground for the judgment of Congress in 1940 that Communist, Nazi, and Fascist organizations were dedicated to principles of force and violence. The years since 1940 have confirmed that judgment. The experience of countries like Czechoslovakia and Poland has tragically demonstrated how minority groups like these, by tactics of infiltration and with the aid of their foreign alliances, can destroy free institutions with a coup when the time is ripe. There has been powerful evidence of Communist Party espionage in this and other countries on behalf of a foreign power. And this threat has been seen to be potent and grave in a time when the constant possibility of lightning war calls for daily vigilance against national disaster, including the wreckage which could be effected by even a small group which seeks to occupy strategic places and which pledges its loyalty to a potential enemy. These harsh realities, sustaining the portion of the Smith Act involved in *Dennis,* equally sustain the portion involved here. For although the charge in *Dennis* was "conspiracy" and the charge here is membership, the danger and the power of Congress to meet it are essentially the same.

2. Petitioner's suggested bases of distinction, with respect to constitutionality, between the "conspiracy"

provisions sustained in *Dennis* and the "membership" clause involved here, have no validity.

(*a*) Like the provisions involved in *Dennis*, the membership clause does not expressly state the element of intent required for conviction. As in *Dennis*, however, it is none the less true "that the statute requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence." 341 U.S. at 499. In *Dennis*, this conclusion followed from the familiar principles that (1) the task of judicial construction is to save, not to destroy, and (2) "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Id.* at 500. These principles apply here. There is no merit in petitioner's claim that the Court should refuse to hold intent to be an element of the crime and thereby create a constitutional difficulty.

(*b*) In his effort to show a constitutional difference between the "conspiracy" problem in *Dennis* and the "membership" problem here, petitioner would have membership in the Communist Party or similar totalitarian organizations viewed as a merely passive status, devoid of any action or concert with others. But we deal here with membership in a rigidly indoctrinated and severely disciplined group dedicated to the violent overthrow of the Government—membership coupled with knowledge of the group's purposes and intent to achieve them. As the Court recognized in *Dennis* (p. 511), "rigidly disciplined members subject to call

when the leaders" find the time has come, comprise the obviously essential sinews of the threat against which the Smith Act is directed. Dealing with such knowing members who aim for the Party's unlawful goals, the membership clause neither covers nor threatens passive dupes or innocents who lack the requisite knowledge and intent.

The rule of *Dennis* does not rest, of course, on some special constitutional principle confined to crimes technically designated as "conspiracies." And the fact is that, at least so far the Constitution is concerned, the combination denounced by the membership clause "partakes of the nature of a criminal conspiracy." *Whitney* v. *California,* 274 U.S. 357, 371-372; see *American Communications Assn.* v. *Douds, supra,* at 432 (Mr. Justice Jackson, concurring). Even the important concurring opinion of Justices Brandeis and Holmes in *Whitney* in no way suggests that the membership clause of the state syndicalism statute there involved ("clear and present danger" considerations being satisfied) presented constitutional difficulties; on the contrary, the implications of the opinion are indicative that those Justices perceived no constitutional obstacle to the enforcement of the membership clause in a proper case.

(*c*) The same reasoning disposes of the claim that the membership clause imposes "guilt by association" and is therefore void. The crime punished is not mere "association." It consists in the individual's personal participation in a combination aimed at forcible revolution with knowledge of this end and intent to achieve it. The liability is personal, not

vicarious. It is for conduct, not mere status. It stands on the same constitutional footing as the conduct held punishable in *Dennis*.

B. *Validity of the clause as applied.*—1. If, as we believe, petitioner fails to show that the membership provision should be held void on its face, he certainly fails to show its invalidity as applied to him. It was proved overwhelmingly that the Communist Party teaches and advocates overthrow of the Government by force and violence, that petitioner knew this, and that he personally intended the accomplishment of that objective. Petitioner was shown to be a Party leader in a significant area, teaching and advocating its doctrines and working for their implementation. The fact that he alone could not overthrow the Government does not immunize him. The same was true of the *Dennis* defendants at the time they were convicted. The Party exists and acts only through its leaders and members who will take action when the time is ripe. Congress could strike at the danger the Party poses in the only way it could be reached—through these leaders and members.

2. Petitioner's specific challenges of the clause as applied have no validity.

(*a*) The record fails to support the claim that the trial court misconstrued *Yates* v. *United States*, 354 U.S. 298, as holding that the Smith Act is directed against advocacy of concrete action irrespective of whether the action is of a violent or a non-violent nature. The court's refusal to give the defense's requested instruction No. 7 does not support petitioner's contention, and the instructions which the

court gave, which petitioner does not criticize, were fully in conformity with those approved by this Court in *Dennis* and *Yates* as to the kind of advocacy with which the Smith Act is concerned.

(*b*) The admission of testimony of former Party members who had no personal knowledge of petitioner or his activities in the Party, on the issue of the nature and character of the Party, did not render the membership clause unconstitutional as applied. The only way to prove what the Party advocated is by the words and teachings of its leading members, and it would be arbitrary to limit the proof on this issue to the words and teachings of the particular leader on trial or of others uttered in his presence. See also the discussion, *infra*, p. 37, relating to the substantially identical issue of the fairness of admitting such testimony.

(*c*) The contention that the indictment failed to charge an essential element of the offense—*active* Party membership—is without merit. The trial court's charge that the jury, to convict, were required to find that petitioner was an active member of the Party was given (at the Government's request) to guard against the possibility that this Court, while accepting the Government's contention that the membership clause is directed only against active Party members, might hold that the determination of this issue is one which should be made by the jury (rather than by the court, in the same manner that the "clear and present danger" determination is made). See Supplemental Memorandum for the United States on Reargument, Nos. 3 and 4, Oct. Term, 1957. Our position remains

what it was before in this Court in this case, *i.e.*, that the "activity" factor is a controlling constitutional standard, to be applied by the *court*, by which to test whether the membership clause has been validly applied in a particular case. It is no more an "element of the offense," required to be charged in the indictment, than is the "clear and present danger" factor. That the issue was submitted to the jury as a precautionary measure, to forestall the possible need for a third trial, necessitated because of the absence of a charge which might just as well be included in the instructions given at the second, did not have the effect of making this factor an "element of the offense" within the meaning of the rule that the indictment must allege each such element.

## II

Section 4(f) of the Internal Security Act of 1950 does not amend the membership clause of the Smith Act so as to exempt membership, with knowledge and intent, in the Communist Party. It provides that membership in a Communist organization shall not constitute "per se" a violation of any criminal statute. But this does not afford the immunity petitioner claims from prosecution under the Smith Act. He was not indicted or convicted for membership "per se", but for membership coupled with knowledge of the Party's purposes and intent to achieve them.

Failing to find the asserted exemption in the statutory language, petitioner fails equally when he seeks it in what he describes as "logic and legislative history" (Pet. Br. 47). The history only confirms that Con-

gress exempted "membership * * * per se" and nothing more. Indeed, the history shows that Congress was particularly concerned with the Communist Party and in no mood to grant its members any immunity beyond that deemed absolutely necessary for purposes of the Internal Security Act. It fully satisfies the asserted demands of logic to conclude that Congress did only what the language it wrote says—that it exempted only "membership * * * per se." Sections 4(a) and 4(c) of the Internal Security Act—covered, like the Smith Act, by this exemption—are similarly not aimed at membership *per se*. In each instance, the exemption functions perfectly well as an aid to interpretation, making certain that mere membership without more is not to be declared criminal.

## III

The evidence sustains the verdict.

A. The evidence as to the character of the Party's advocacy of violence meets the *Yates* (354 U.S. 298) standard of a call to forcible action at some future time. The proof shows that the Party engaged in systematic, personal indoctrination—not merely in the abstract principles and tenets of Marxism-Leninism, but in the necessity that Party members personally take part in the ultimate violent seizure of power in this country (under the Party's leadership) which is and has been the Party's ultimate aim and objective. An essential aspect of this personal indoctrination—explicit at times, but always implicit at the least—was the urging of all Party members and pupils in the numerous schools and classes and per-

sonal briefing sessions to join forces with all other Party members at the critical time (when the "time was ripe" and the "signal was given") and personally take part in the forcible overthrow of the Government. The record compels the conclusion that it was the intention of the Party leaders and teachers, in indoctrinating Party members and pupils in the classes and schools and individual briefings, to advocate to such members and pupils not merely that it would be a good thing if somebody, someday, overthrew this Government by force and violence, but that they take personal part in a future violent seizure of power, when conditions are right and the summons to immediate action is received from the Party's leaders.

Collectively considered, such evidence, much of which directly involved petitioner, constituted the sort of proof which this Court, in *Yates,* referred to as meeting the evidentiary requirements of the Act, *i.e.,* evidence of "Party classes * * * where there occurred what might be considered to be the systematic teaching and advocacy of illegal action," including the "develop[ment] in the members of the group [of] a readiness to engage at the crucial time, perhaps during war or during attack upon the United States from without, in such activities as sabotage and street fighting, in order to divert and diffuse the resistance of the authorities and if possible to seize local vantage points" (354 U.S. at 331). The Court has held that the Government need not "wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited," but may take preventive action

when it "is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit" (*Dennis,* 341 U.S. at 509). The evidence at bar established that the Communist Party was during the indictment period precisely such a group.

B. The evidence is equally clear and sufficient to prove petitioner's unlawful knowledge and intent. Petitioner acknowledges that he was the Party leader in the Carolinas. This alone goes a long way to prove his knowledge of what the Party was about. In addition, however, there was extensive evidence specifically detailing petitioner's own acts and declarations. These revealed clearly his knowledge and endorsement of the Party's objectives.

The same evidence compelled the jury's determination that petitioner personally intended the realization of these objectives. He led the Party in the Carolinas; he taught its doctrines and recruited members; he worked openly and then underground in the Party's cause. While it may be possibly imaginable that a person could bend all his efforts in this way toward a specific goal without intending to reach it, the jury was certainly free to conclude beyond a reasonable doubt that no such hypothetical divergence between conduct and intent existed here.

## IV

Petitioner received a fair trial.

A. Petitioner's motion attacking the indictment because of the composition of the grand jury was prop-

erly rejected because (1) it came too late and (2) it was insufficient on its merits.

1. Such a motion must be made before the plea is entered or "within a reasonable time thereafter" when allowed by the trial judge. Failure to present the motion within the prescribed time constitutes a waiver. Rule 12, F.R. Crim. P. Petitioner was given extensions totaling 64 days after his plea in which to present his numerous pre-trial motions. The motion here in question was not made until more than two weeks after the expiration of these ample extensions. There was no suggestion of a reason, and there is none now, for the delay. These circumstances fully warranted the decision that the motion must be denied as untimely.

2. In any event, petitioner's attack on the grand jury which indicted him presents no basis for reversal. Petitioner claims that 28 U.S.C. 1864 was violated in that the Jury Commission could not have known that there were 300 names of qualified persons in the box when the panel here involved was drawn. But the Deputy Clerk testified that there were in the neighborhood of four hundred to five hundred names in the box and that he was "satisfied" that the number was "more than three hundred"; that, based on 70 years' residence, he had a "pretty good knowledge" of the people in the county involved, including their "background and their present status"; and that it had been his experience that the jurors drawn for service had represented a fair cross-section of the community. The testimony further showed that the Clerk never intentionally or systematically excluded any class

or group and that he sought a wide selection of jurors from all walks of life. Special efforts were made to secure women and Negro jurors. The fact that names of prospective jurors were solicited from community leaders and organizations does not vitiate the Jury Commission's action or the indictment. This was not a case like *Glasser* v. *United States,* 315 U.S. 60, where the defect was solicitation of names from a single organization and a consequently improper weighting of the list. See *Dow* v. *Carnegie-Illinois Steel Corporation,* 224 F. 2d 414, 427 (C.A. 3); *United States* v. *Dennis,* 183 F. 2d 201, 218 (C.A. 2), affirmed on other issues, 341 U.S. 494.

It should be noted, finally, that the method of selection in the district here involved has been changed so as to correct the asserted deficiencies of which petitioner complains. This fact, coupled with the tardiness of the objection and the utter absence of prejudice, makes this a singularly inappropriate case for invoking the supervisory powers of this Court.

B. Petitioner argues that he must be presumed to have been denied a fair trial because Congress, in the Internal Security Act of 1950 and the Communist Control Act of 1954, made findings that the Communist Party aims at violent overthrow of the Government. Because of these legislative findings, it is said, the jury must necessarily be deemed to have been incapable of following the instructions which required that it determine the nature of the Communist Party for itself. But there was no evidence of the bias petitioner would have the Court presume as a matter of law. It was not shown either that the

jurors actually knew of the legislative findings in question or were influenced by them if they did. Petitioner's theory would invalidate every conviction under the Smith Act since 1950 on this ground alone. But the theory, which attacks the verdict on premises inconsistent with the jury system itself, is unacceptable. The suggested possibility of bias could certainly have been explored; it is not a matter to be presumed without proof. Compare *Accardi* v. *Shaughnessy,* 347 U.S. 260, with *Shaughnessy* v. *Accardi,* 349 U.S. 280.

C. The "Jencks" Act's excision procedures (subsection (c) of 18 U.S.C. 3500) are valid, and their application to petitioner's trial did not violate the constitutional prohibition against *ex post facto* legislation.

1. The excision provisions of the "Jencks" Act (directing that, before statements by prosecution witnesses in the Government's possession are turned over to the defense for cross-examination purposes, the court, after *in camera* inspection, excise portions which do not relate to the subject matter of the testimony of the witnesses) are valid.

(*a*) Assuming *arguendo* that the *Jencks* decision, 353 U.S. 657, is based on constitutional grounds, the statutory excision procedure is fully consonant with *Jencks.* Under *Jencks,* only statements which relate to the subject matter of the witness' testimony need be turned over to the defense. There is no more reason for turning over non-relevant portions of a witness' statement which is relevant in part than there is for turning over a statement which is wholly irrelevant to that subject matter. The defendant is

fully protected against the possibility of an erroneous or arbitrary ruling by the trial judge as to the non-germane portions of a statement by the provision of the statute directing that the entire statement be preserved for inspection by the appellate court in the event that the defendant is convicted and appeals. The defense should not be entitled to see a statement of a witness contained in the Government's confidential files in order to determine for itself whether the Government is correct in maintaining that the statement, because it in no way relates to the subject matter of the witness' testimony, should not be seen by the defense.

(*b*) In any event, the *Jencks* decision proceeded, not on constitutional grounds, but on the basis of "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience" and "[*i*]*n the absence of specific legislation*" (emphasis added) (*Gordon* v. *United States*, 344 U.S. 414, 418, which decision *Jencks* followed and explained).

2. The question of the validity of the "Jencks" Act's definition of "statement" (subsection (e)) does not arise on this record because the *Jencks*-type materials which were in fact turned over to the defense were not limited to statements of the type defined in subsection (e), but (subject to the excision of non-relevant material) included everything which was conceivably demandable under the *Jencks* decision, without regard to the subsection (e) definition.

3. The contention that the application of the "Jencks" Act to petitioner's trial violated the consti-

tutional ban on *ex post facto* legislation because his offense preceded the Act is unavailable because made for the first time in this Court. It is in any event without substance. The excision procedures of the Act—the only provisions of which petitioner can complain—are wholly consonant with *Jencks*, and so did not alter (certainly not in any substantial sense) previously-existing law as interpreted in *Jencks*. Accordingly, no *ex post facto* question arises. But even if it be assumed that the excision provisions of the Act effected a change in previously-existing law, the change was, at most, one relating "to modes of procedure only, in which no one can be said to have a vested right," and which, accordingly, Congress may regulate at pleasure" (*Hopt* v. *Utah*, 110 U.S. 574, 590).

D. Evidence petitioner attacks as inadmissible was relevant and otherwise competent.

1. It was proper to receive evidence as to the nature and character of the Communist Party which was not directly linked to petitioner. The first element to be proved in a "membership" case is that the group or society was one which taught and advocated the forcible overthrow of the Government. To limit such proof to acts and statements of the particular individual charged (or done or uttered in his presence) is unacceptable because the group's character cannot be established solely by proof of the acts and statements of an individual in isolation.

2. The "three documents * * * relating to the Korean War" (Pet. Br. 65) of which petitioner complains were admissible in the trial judge's discretion.

to show that the Party seeks unceasingly to sow the seeds of dissension among the people in an effort to embitter them against their own Government, as part of its long-range strategy of weakening that Government in every way possible, and thus speeding the day when its forcible overthrow will become a practical possibility. Such evidence, which was directly linked to petitioner, tended to show that the Party is a serious *action*-organization which implements its program of ultimate violence with interim plans for preparing the groundwork for the final coup.

3. The evidence that the Party teaches that the Negroes in this country's so-called "Black Belt" should be regarded as an oppressed nation with the right of self-determination was admissible because this teaching was shown to be a basic part of the strategy and tactics of the proletarian revolution which the Party advocates. Petitioner himself was shown to have related the "Black Belt" and "Negro nation" concepts to the Party's program of violent revolution.

## ARGUMENT

### I. THE MEMBERSHIP CLAUSE OF THE SMITH ACT IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED TO THE FACTS OF THIS CASE

We recognize, with the petitioner (Pet. Br. 15), that constitutional issues are to be reached last, not first. However, petitioner begins his argument with the Constitution, and we accept his arrangement of points for the convenience of the Court. We submit that this case is substantially controlled on the constitutional issues by the principles enunciated in *Dennis* v. *United States*, 341 U.S. 494, and reaffirmed

in *Yates* v. *United States*, 354 U.S. 298.[9] Petitioner has failed in his effort to show that, while Congress could punish conspiracy to organize a group which, like the Communist Party of the United States (as established by the evidence in this case, see *infra*, pp. 75–85), advocates the violent overthrow of the American Government in the sense of a call to present or future forcible action, it was powerless to proscribe knowing, purposive, active—and here, high level—membership in such a group from which alone the organization derives its power to work towards the accomplishment of its violent objective.

A. VALIDITY OF THE CLAUSE ON ITS FACE

1. Reviewed at length in *Dennis*, and long familiar to the Court in any event (see, *e.g.*, Mr. Justice Jackson's opinion in *American Communications Assn.* v. *Douds*, 339 U.S. 382, 422 *et seq.*), the extensive knowledge of totalitarian threats on which Congress has acted scarcely requires lengthy rehearsal here. As the Court knows and everyone knows, it was clear by 1940, when Congress wrote the Smith Act, that the Communist, Nazi, and Fascist movements, armed with

[9] In *Yates*, the convictions were reversed, but on grounds not relevant to the present issue. *Yates* did not weaken the authority of the *Dennis* case but adhered to and reaffirmed the principles underlying that decision (see *Yates*, 354 U.S. at 300, 320–327). *Yates*, in presently pertinent part, held that the kind of advocacy condemned by the Smith Act (as sustained in *Dennis*) is advocacy of violence in the sense of a call to action (now or in the future), as distinguished from advocacy of violence solely as an abstract principle. We argue *infra*, pp. 75–85, that the evidence in this case as to the character of the Communist Party's advocacy of violence fully meets the *Yates* standards.

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modern techniques of subversion and infiltration, posed grave threats to democratic governments the world over. To focus only on the Communist Party, which is involved here, Congress had before it voluminous evidence that the Party's members had at least divided loyalties,[10] and that the Party was under the firm, direct control of the Communist International, and, through it, of the Soviet Union.[11] From the testimony of Earl Browder and Benjamin Gitlow and from a great mass of documentary evidence, Congress could reasonably conclude that both the Communist International and the Communist Party of the United States were devoted jointly to a program of establishing socialism through the medium of violent revolution.[12]

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[10] See, for example, the testimony of William Z. Foster, Chairman of the Communist Party of the United States, before the House of Representatives Special Committee To Investigate Communist Activities in the United States, 1930-1931, in which Foster stated that the "more advanced workers" in this country look upon the Soviet Union as "their country" (Hearings, Part I, Volume 4, pp. 384, 385).

The evidence in this case makes it clear that this situation was not limited to the 1920's and 1930's. In 1950, petitioner told the witness Clontz that American Communists looked to the Soviet Union as their "mother country," whose help they would have the benefit of "when the revolution started" (*supra*, pp. 15–16).

[11] Hearings before House Committee on Un-American Activities on H. Res. 282, 76th Congress, 1st sess., pp. 4308-4311, 4432, 4671.

[12] See, *e.g.*, the statement of Representative McCormack of Massachusetts:

"* * * We all know that the Communist movement has as its ultimate objective the overthrow of government by force and violence or by any means, legal or illegal, or a combination of both. That testimony was indisputably produced before the

Events following 1940, both prior to and since the *Dennis* decision, have served to make the Communist threat clearer and more serious and to confirm the judgment on which Congress proceeded in the Smith Act. Immediately following the collapse of Nazi Germany, Soviet troops occupied Poland, Czechoslovakia, Hungary, Bulgaria and Rumania. In each of these countries a new government was established consisting of a coalition of parties, and in each of these countries the Communists were a minority party. In each case the Communists secured control of the Ministry of the Interior—control of the police—and gradually assumed power through the oppressive use of the police and pressure exerted by the Soviet Union.[13]

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special committee of which I was chairman, and came from the lips not of those who gave hearsay testimony, but of the actual records of the Communist Party of the United States, presented to our committee by the executive secretary of the Communist Party and the leader of the Communist Party in the United States, Earl Browder. That was the testimony, the best evidence presented to our committee at that time, that such is the objective of the Communist Party. Therefore, a Communist is one who intends knowingly or willfully to participate in any actions, legal or illegal, or a combination of both, that will bring about the ultimate overthrow of our Government. He is the one we are aiming at, and the Government should have the burden of proving that a person 'knowingly or wilfully' advocates the overthrow of government and is 'knowingly or wilfully' a member of an organization that believes in the ultimate overthrow of our Government." [84 Cong. Rec. 10454]

[13] Poland—15 State Dept. Bull. 422; 16 State Dept. Bull. 299.

Rumania—15 State Dept. Bull. 1057; 17 State Dept. Bull. 38, 329, 995; 18 State Dept. Bull. 216; 20 State Dept. Bull. 450, 692, 755.

Hungary—16 State Dept. Bull. 495, 583, 1215; 17 State Dept. Bull. 392, 411; 20 State Dept. Bull. 450, 556, 692, 697, 755.

Bulgaria—16 State Dept. Bull. 1218; 17 State Dept. Bull.

Recent history demonstrates also that Communist Parties in various countries have provided an extensive network of espionage on behalf of the Soviet Union. Canada discovered the existence of a Soviet espionage ring in 1946,[14] Australia in 1954, when Vladimir Mikhailovich Petrov left the service of the Soviet Union and was granted political asylum in Australia.[15] That a similar network of espionage has existed in the United States and elsewhere seems unquestionable from the testimony of such persons as Whittaker Chambers[16] and Elizabeth Bentley,[17] from the case of Klaus Fuchs in England,[18] and from the *Rosenberg* and *Abel*. (No. 263, this Term) espionage trials in this country.

In a word, contemporary history compellingly supports the opinion of Mr. Justice Jackson in *American Communications Assn.* v. *Douds*, 339 U.S. at 425, 429, in which he said:

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429, 481, 531, 702; 19 State Dept. Bull. 447, 710; 20 State Dept. Bull. 450, 556, 692, 755.

Czechoslovakia—18 State Dept. Bull. 304, 446, 536.

[14] *Report of the Canadian Royal Commission*, which was issued after a thorough investigation by a commission of two Canadian Supreme Court Justices.

[15] *Report of the Royal Commission on Espionage* of the Commonweath of Australia, published in 1955.

[16] Hearings before the House Committee on Un-American Activities Regarding Communist Espionage in the United States Government (1948), pp. 1429–1449.

[17] Hearings, *supra* fn. 16, pp. 503–562.

[18] The text of Fuchs' confession is partially reproduced in the *New York Times* for February 11, 1950, p. 2.

1. *The goal of the Communist Party is to seize powers of government by and for a minority rather than to acquire power through the vote of a free electorate.* * * *

* * * * *

3. *Violent and undemocratic means are the calculated and indispensable methods to attain the Communist Party's goal.* It would be incredible naïveté to expect the American branch of this movement to forego the only methods by which a Communist Party has anywhere come into power. In not one of the countries it now dominates was the Communist Party chosen by a free or contestible election; in not one can it be evicted by any election. The international police state has crept over Eastern Europe by deception, coercion, *coup dé'tat,* terrorism and assassination. Not only has it overpowered its critics and opponents; it has usually liquidated them. The American Communist Party has copied the organizational structure and its leaders have been schooled in the same technique and by the same tutors. [Italics in the original.]

The familiar dangers with which Congress, in enacting the Smith Act, concerned itself become greatly magnified in times of grave national crises. The serious threat under which free nations of the world must live today is, through force of necessity, receiving more and more recognition. Since 1955, the Executive Branch of the Government has conducted annual nation-wide Civil Defense exercises to help

insure the country's preparedness in the event of a hostile attack.[19]

The exercises in preparation for possible large-scale nuclear attacks are designed to cope with the problems arising "in a period of 'heightened internationa' tension and deteriorating international relations.' "[20] It requires no lively imagination to com-

[19] In July 1956, following a mock hydrogen bomb attack, the test was carried out on the assumption that planes had dropped bombs and submarines had fired guided missiles on targets consisting of 63 cities, nine air bases, and four Atomic Energy installations. In the New York City area alone it was assumed, for purposes of the test, that five imaginary one-megaton bombs were dropped, inflicting about six million casualties. Ten thousand key operating personnel were required to evacuate Government departments in Washington and travel to 65 relocation centers. *New York Times*, July 20, 1956, p. 1, and July 21, 1956, p. 1. The 1957 exercise assumed a mock attack in which 175 hydrogen bombs were dropped on 162 American cities. The blast of a single twenty-megaton bomb in the New York City area alone, equivalent in destructive power to 20,000,000 tons of TNT, was estimated to have resulted in over six million casualties, without considering the bomb's radioactive fallout propensity. This test similarly entailed a theoretical mass evacuation of thousands of Government employees to relocation sites. *New York Times*, July 13, 1957, pp. 1, 3, July 14, 1957, p. 8, and July 20, 1957, p. 6. The 1958 Operation Alert concentrated on the recovery phase, as opposed to the immediate attack and post-attack phases, of a supposed continental nuclear attack. Again, there was a hypothetical evacuation of thousands of key Government officials and their staffs from Washington to relocation centers for the purpose of resuming governmental functions. *New York Times*, February 20, 1958, p. 4, July 15, 1958, p. 7, and July 17, 1958, p. 13.

[20] *New York Times*, July 7, 1957, p. 9. Current world events of which this Court may well take judicial notice—events associated with such places as Lebanon, Quemoy, and Berlin—reflect, unfortunately, no recent improvement in these international relations or relaxation of such tension.

prehend the danger that would be presented to the national security in a time of disaster by an organization consisting of thousands of highly disciplined, tightly organized, adherents whose doctrines are ideologically attuned to the aggressor nation and who have been located in key positions for revolutionary purposes. And so the danger to which Congress and the Executive have found need to address themselves must be and has been appraised in terms of the lightning speed of modern warfare. Doctrines of infiltration into strategic places and readiness to aid a foreign power's assaults, familiar and central features of the Communist program, cannot be weighed on outmoded assumptions which consider only the threat of the Party by itself in a "normal" world. The threat is not the less real, large, or potentially disastrous for the fact that no one can predict for sure when or if the preparation will eventuate in a direct and violent assault on our security and institutions.

2. Recognizing the solid factual basis on which Congress acted (see, *e.g.*, 341 U.S. at 510–11), this Court, in *Dennis*, concluded (p. 516) "that §§ 2(a)(1), 2(a)(3) and 3 of the Smith Act do not inherently, or as construed or applied in the instant case, violate the First Amendment and other provisions of the Bill of Rights * * *." That conclusion and the premises on which it rests govern this case. To be sure, we are concerned here specifically with the "membership" provision whereas the convictions in *Dennis* were for conspiracy (1) to organize the Communist Party as a group of persons who teach and advocate overthrow

of the Government by force and violence and (2) knowingly and willfully to advocate and teach the duty and necessity of such overthrow. 341 U.S. at 497. And so the present petitioner has undertaken to show that, though Congress could strike at the Communist conspiracy in its inception, it lacks power to reach the forged weapon by punishing those who constitute it when they become and remain members of the Party, knowing its purposes, intending their achievement as speedily as possible, and supplying in this way the force by which such achievement is sought. For this view, petitioner argues (a) that it is "at least doubtful" that a requirement of personal intent may be found in the membership clause though such intent was found to be a requisite in the *Dennis* provisions, and this lack invalidates the statute (Pet. Br. 25, fn. 30);[21] (b) that there is a constitutional difference between the evil of the conspiracy in *Dennis* and the evil of the membership involved here, because the individual as a member lacks the strength and may lack the intent to overthrow the Government (Pet. Br. 20–24); and (c) that the membership clause punishes mere association and imposes "guilt by association" (Pet. Br. 27–28). These arguments, largely ignoring the factual realities which concerned Congress and are revealed in the record here, fail

[21] Petitioner's "doubt" on this question represents a retreat from his position on this point as expressed in his prior brief in this Court. There he argued, affirmatively, that intent "should not be read by implication into [the membership] clause" (Pet. Br., No. 29, Oct. Term, 1956 [No. 3, Oct. Term, 1957], p. 17).

utterly to warrant the proposed constitutional distinction between this case and *Dennis*.

(*a*) *Intent*—As in the portions of the Act considered in *Dennis*, the membership clause does not state expressly the requirement of personal intent. In *Dennis*, following the familiar principle that judicial construction of statutes should save rather than destroy, it was held "that the statute requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence." 341 U.S. at 499. It was recalled there that "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Id.* at 500. That ruling, with its salutary reasons, is squarely apposite here.

Directly contrary to this Court's reminder "that it is the duty of the federal courts to interpret federal legislation in a manner not inconsistent with the demands of the Constitution" (*Dennis*, 341 U.S. at 501), petitioner here contends that, in contrast to *Dennis*, it is "at least doubtful that intent may be read by implication" (Pet. Br. 25, fn. 30) into the membership clause. The effort, we think, has been sufficiently refuted. The principles of constitutional adjudication and criminal jurisprudence which required intent as an element in *Dennis* require it no less here. It is no answer to suggest, in a curious insistence on creating constitutional infirmities, that conspiring to organize the Party and teach and advocate its unlawful objectives (*Dennis*) necessarily en-

tails intent to achieve these objectives, while membership in the Party does not (Pet. Br. 23–24). At most, the suggestion could mean that in certain imaginable cases, not the one here, membership might be proved without showing the requisite intent. It by no means follows that the courts should strain after constitutional difficulty by rejecting the natural conclusion that intent is an element of the crime the statute denounces.

(*b*) *"Membership"*—Pervading petitioner's constitutional arguments is the premise that membership in the organizations against which the Smith Act is directed—with knowledge of their purposes and intent to achieve them—is a merely passive status, connoting neither actions nor declarations, amounting only to a harmless and constitutionally protected form of peaceful assembly. *Dennis* was different, the argument runs, because the crime there was a "conspiracy" and conspiracy—being active and "at work"—stands on a wholly different constitutional footing from "membership." The argument could stand only if "membership" and "conspiracy" were no more than lifeless abstractions and isolated dictionary terms, divorced from their context in the Smith Act and from the evils to which the Act is directed.

The fact is, however, that the "membership" against which this statute is directed is not passive membership in a literary society but (1) active membership in an organization teaching or advocating the Government's violent overthrow, (2) with knowledge of the organization's purpose and (3) a

personal intent to accomplish that purpose. The familiar teachings of recent history, reflected in this case and so many others, show that the membership in question, unlike membership in a club or political party, entails rigidly disciplined adherence to and labors for the organization's unlawful objectives. Thus, in rejecting the constitutional attacks presented in *Dennis*, this Court noted as an essential and integral element of the "highly organized conspiracy" its "rigidly disciplined members subject to call when the leaders * * * felt that the time had come for action * * *." 341 U.S. at 511. Similarly, Mr. Justice Jackson wrote in *American Communications Assn.* v. *Douds*, 339 U.S. 382, under the topic heading, *"Every member of the Communist Party is an agent to execute the Communist program"* (p. 431), that (p. 432):

> Membership in the Communist Party is totally different [from membership in lawful political parties]. The Party is a secret conclave. Members are admitted only upon acceptance as reliable and after indoctrination in its policies, to which the member is fully committed. * * * Moreover, each pledges unconditional obedience to party authority. Adherents are known by secret or code names. They constitute "cells" in the factory, the office, the political society, or the labor union. For any deviation from the party line they are purged and excluded.
>
> Inferences from membership in such an organization are justifiably different from those to be drawn from membership in the usual type of political party. Individuals who assume

> such obligations are chargeable, on ordinary conspiracy principles, with responsibility for and participation in all that makes up the Party's program.

It was against membership of this now familiar kind that Congress directed the Smith Act. Expressing the frequently reiterated understanding of the Congress, Congressman McCormack said during the consideration of the bill which became the Act (84 Cong. Rec. 10454):

> A Communist is one who "knowingly or willfully" is committed to a movement which has as its objective the ultimate overthrow of government by any means legal or illegal, or a combination of both. We all know that the Communist movement has as its ultimate objective the overthrow of government by force and violence or by any means, legal or illegal, or a combination of both. That testimony was indisputably produced before the special committee of which I was chairman, and came from the lips not of those who gave hearsay testimony, but of the actual official records of the Communist Party of the United States, presented to our committee by the executive secretary of the Communist Party and the leader of the Communist Party in the United States, Earl Browder. That was the testimony, the best evidence presented to our committee at that time, that such is the objective of the Communist Party. * * *

Against the background of the realities with which Congress was concerned in the Smith Act there is no meaningful place for the suggestion that the member-

ship clause must be held invalid on its face because, read only as a bare collocation of words without a context, it *could* reach the "entirely passive" member who attends no Party meetings and has no "Party contacts or activities" of any kind (Pet. Br. 24–25). Certainly, there has been no effort to prosecute such an individual in the case before the Court or in any other. This is clearly not such a case, as the jury necessarily found in arriving at its verdict.[22] And the hypothetical possibility is—to paraphrase *Dennis*—"particularly nonpersuasive when presented by [petitioner], who, the jury found, intended to overthrow the Government as speedily as circumstances would permit" (at 515).[23] In any event, the possibility is in fact only imaginary when it is considered in the light of what Congress justifiably believed and sought to guard against when it wrote the Smith Act. Sensibly read, the language negatives any basis for fearing that the innocent or the duped may be ensnared.[24] It is

[22] See *infra*, pp. 64–68.

[23] The quoted language was used in rejecting a claim that the Smith Act, as construed, was objectionably vague.

[24] The situation is thus very different from that which existed in *DeJonge* v. *Oregon*, 299 U.S. 353, where the indictment was brought under an Oregon statute making it a crime "to preside at or conduct or assist in conducting any assemblage of persons, or any organization, or any society, or any group which teaches or advocates the doctrine of criminal syndicalism." Since it was held that the statute was so broad in its scope that it could reach individuals who were not themselves members of the Communist Party or familiar with its purposes, the Court found the statute unconstitutional on its face with the observation (p. 362) that "peaceful assembly for lawful discussion cannot be made a crime."

Similarly unhelpful to petitioner is *Herndon* v. *Lowry*, 301

directed only at those who, with full knowledge of the organization's unlawful purposes, lend it their "aid and encouragement" and add to its strength by their active membership, thereby making themselves "party to the unlawful enterprise in which it is engaged." *Frankfeld* v. *United States*, 198 F. 2d 679, 684 (C.A. 4), certiorari denied, 344 U.S. 922. Finally, if a prosecution should be brought against a passive member who does not fall into this category, the courts could strike down the conviction as constitutionally invalid—just as they would strike down a conviction if not satisfied of the presence of a "clear and present danger." See *infra*, pp. 64–68.

It seems clear, then, that the applicability of the *Dennis* ruling is not to be escaped by the effort to assign to the "conspiracy" there a constitutional significance which disappears wholly from the tightly interrelated "membership" now before the Court. We submit, on the contrary, that if, as *Dennis* establishes, Congress can proscribe the teaching and advocacy of violent overthrow of the Government and can proscribe the organizing of a group for such purpose, it can equally prohibit active membership in such a group—particularly high-level member-

U.S. 242, where, reversing a state conviction for an attempt to incite to insurrection by violence, decision went "on the ground that the Fourteenth Amendment prohibited conviction where on the evidence a jury could not reasonably infer that the defendant had violated the statute the State sought to apply." *Dennis*, at 538 (Frankfurter, J., concurring). There, though the defendant had solicited members for the Communist Party, the defect was a lack of proof "that he had urged or even approved those of the Party's aims which were unlawful." *Ibid.*

ship—coupled with knowledge of the purpose and a specific intent to accomplish it as speedily as possible. Indeed, insofar as the problem of conspiracy has a role in sustaining the power of Congress to act, it is scarcely less present here than it was in *Dennis,* where the specific term "conspiracy" described the crime. For, as Mr. Justice Jackson said in the opinion quoted earlier, "ordinary conspiracy principles" are plainly relevant to membership in an organization where membership entails such tightly disciplined, quasi-military, deeply conspirational activities as those of the organizations against which the Smith Act is directed. *American Communications Assn.* v. *Douds, supra,* at 432. Such membership obviously partakes of the concert-of-action, combination, and acting-together which characterize conspiracy. As observed by the court below (R. 459):

> [M]embership in an organization with knowledge of its purposes and an intent to make them effective is a joint rather than an individual undertaking which gathers its strength from an association or group of individuals inspired by a common purpose. * * * [H]e who joins [such a group] with open eyes becomes a party to all that he sees.

These views, rendered more compelling by the experience of the intervening years, merely echo what this Court said thirty years ago in the comparable, though measurably less acute, circumstances of *Whitney* v. *California,* 274 U.S. 357, 371–372:

> The essence of the offense denounced by the Act is the combining with others in an association for the accomplishment of the desired

> ends through the advocacy and use of criminal and unlawful methods. It partakes of the nature of a criminal conspiracy. * * * That such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals, is clear.

To be sure, what the Court said in *Whitney*—and has never repudiated—must be read with the weighty concurring opinion of Justice Brandeis, joined by Justice Holmes. But at this juncture the significant fact about that opinion is precisely that it was a concurrence, joining in affirmance of the conviction. The state statute there punished membership, as does the provision here, and the information charged, in the conjunctive, the organizing of, and knowing membership in, the organization there involved. Justice Brandeis' opinion was concerned with "clear and present danger" considerations. After pointing out that Miss Whitney had failed to raise the clear and present danger issue at her trial, Justice Brandeis said that if she had done so, and if the issue had been resolved in her favor by a finding on the part of the court or jury that the requisite danger did not exist (the Justice indicated that a finding that such danger did exist might well have been supportable), he would have voted to reverse; it was only because that issue had not been raised that he voted to affirm, and so concurred in the result. But the significant point about the concurring opinion for present purposes is that it did not distinguish between the organizing and membership clauses of the information, or in any way

indicate that violation of the membership provision of the statute would not have been constitutionally punishable provided the clear and present danger test was met. There is nothing in the opinion to suggest that a statute denouncing "membership" as a crime is, as petitioner urges, void on its face; on the contrary, the implications of the opinion are quite to the contrary.

Thus, both opinions in *Whitney* help to refute the claim that, in the teeth of *Dennis,* upholding the closely related conspiracy provision, the membership clause of the Smith Act may be held void on its face. In itself, the particular word "conspiracy" is obviously not the key to the constitutional problem. Insofar as there is importance in the nature of the public dangers to which "conspiracy" may be a shorthand reference in the Smith Act context, the same factual judgments by Congress which sustain the conspiracy provision of the Act defeat the contention that the companion membership clause is void.

(*c*) *"Guilt by association"*—The considerations just discussed dispose equally of the claim that the membership provision is invalid because it creates a crime involving only "guilt by association." The defendant convicted under this provision is, in the words of petitioner's brief (p. 27), "held criminally liable only for his own conduct, or for the conduct of others in [a] form of concert or combination which is recognized by our law as warranting holding an individual participant responsible for the acts of other participants." There is no force in petitioner's subsequent observation (*ibid.*) that " 'Membership' is not

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such a recognized combination." For the fact is that the kind of membership at which the Smith Act strikes—active, knowing, purposive—is precisely such a combination, long recognized by Congress and by all the world. And the only question is whether, having recognized it, Congress was powerless to act against it. The *Dennis* case answers that question, and the square applicability of the answer here is not obscured by the facile claim that the membership in issue amounts only to "guilt by association." "Guilt by association" connotes personal innocence and unawareness. That term cannot be used to describe active membership in a group such as the Communist Party, with full knowledge of its unlawful aims and the personal intent to bring them about. See also *infra*, pp. 64–68, 85–88.

B. VALIDITY OF THE STATUTE AS APPLIED IN THIS CASE

1. If, as we have urged, the membership provision is valid on its face, there can be little doubt that it could be and was constitutionally applied in this case. Viewing the indictment alone, and building upon his factually groundless premise that the membership in question is a merely passive "status," the petitioner says (Pet. Br. 24) that "[f]or all that appears from the indictment * * *, he never met another member of the Communist Party, much less discussed or plotted the violent overthrow of our Government with any other members." It might as well be said that a man who spent his career in the Navy never met another sailor. The answer is, of course, that the in-

dictment does not charge "membership" as a bare, general abstraction applicable both to a garden club and to Murder, Incorporated, but a particular membership—membership in "a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit" (R. A2), and membership coupled with full knowledge of the group's aims and intent to accomplish them "as speedily as circumstances would permit" (*ibid.*). The indictment describes considerably more than a mere "status (membership) and state of mind" (Pet. Br. 24). It charges, as we have shown, that petitioner joined himself with an unlawful combination which Congress could validly proscribe as a whole and in its constituent parts.

Turning from the indictment to the proof, the validity of the statute's application becomes even clearer. The evidence, reviewed elsewhere (*supra,* pp. 6–23; *infra,* pp. 75–88, 121–139), demonstrated clearly that the Communist Party—wedded to doctrines of violent revolution, tightly controlling and indoctrinating its members—teaches and advocates the forceful overthrow of the Government. It was proved beyond doubt that petitioner fully understood, supported, and intended the achievement of the Party's ends; that he was no mere innocent or trivial underling, but a *leader* in the organization with control over a significant area; and that he engaged aggressively in the Party activities his active membership and leadership entailed. The proof fully sustained both the jury's verdict and

the trial judge's finding of the existence of "clear and present danger."

The considerations which answered the clear-and-present-danger argument in *Dennis* apply here as well. Petitioner is, of course, correct when he states (Pet. Br. 22–23) that neither he nor any other individual has power to overthrow the Government by force. But it was no less clear in *Dennis* that the Party as a whole, with those who conspired to organize it—without the events they anticipated—lacked such power currently or for at least the near future. (But cf. pp. 41–45, *supra,* recalling the experience of countries like Poland and Czechoslovakia and the nature of the Party's infiltration program which, at least today and for the foreseeable future, makes the danger presented by the Party a threat capable of calamitous realization). *Dennis* teaches, however, that Congress may act against "an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists * * *." 341 U.S. at 509. The power which entitled Congress to act against a conspiracy to organize the Party is at least equally available to strike against the Party-in-being in the only way the Party can function and be reached—through its members. The fact that each member in isolation, even a leading member, may seem insignificant cannot bar Congress from dealing with the "ingredients of the reaction * * *." *Dennis,* at 511. Just as the Nation's commerce may be protected by dealing with individual instances which taken alone lack consequence (*e.g., Polish National*

*Alliance* v. *National Labor Relations Board,* 322 U.S. 643, 647-648), the Communist Party's threat to the national security may be reached through the members who comprise it, at least where those members have the active purpose to help the Party achieve its unlawful objective. Such members will either be the leaders who undertake to launch violent action when "the circumstances permit", or the indoctrinated followers who will readily and enthusiastically answer the call (*Dennis,* at 509, 511). Petitioner was the Party leader in the Carolinas, a "rigidly disciplined" member of the conspiratorial group, and the one most likely to plan and carry out the Party's unlawful objective in that area.

2. Petitioner argues, however, that, as applied in this case, the membership clause is unconstitutional because, allegedly, (a) the trial court erroneously construed the *Yates* holding (354 U.S. 298, 312, 320) as to the nature of the advocacy, or "incitement," properly punishable under the Smith Act (Pet. Br. 33–39), (b) the admission, as part of the Government's proof of the nature and character of the Communist Party, of testimony of persons (former Party members) who did not have any knowledge of petitioner or of his Party activities rendered the "metes and bounds of the Smith Act, in terms of guilt or innocence," so "vague and far-reaching" as to be violative of due process as well as the First Amendment (Pet. Br. 39–41), and (c) the indictment failed to charge an essential element of the offense (Pet. Br. 41–44). We submit that none of these contentions has merit.

(*a*) After adverting to the fact that under the standards of proof laid down by this Court in the *Yates* case, 354 U.S. 298, "advocacy of forcible overthrow is punishable under the Smith Act only (354 U.S. at 312, 320) if the advocacy is of such a nature as to 'incite' persons to take 'concrete action for the forcible overthrow of government'" (Pet. Br. 33), petitioner argues (Pet. Br. 33–39) that "the prosecution and the court put an erroneous construction on this requirement" (Pet. Br. 33). "The prosecution saw only the words 'concrete action,'" says petitioner, "and ignored or overlooked the qualifying phrase 'for the forcible overthrow of government.' As a result, the prosecution took the position that proof of Communist Party incitement to action of *any kind* would be relevant to the case and sufficient to meet the standard of proof prescribed in the *Yates* case" (Pet. Br. 33–34; petitioner's emphasis). That the court shared this misconception, the argument concludes, is evidenced by the fact that it refused to give a defense-requested instruction (No. 7; R. A33–A34) that "the 'action for the forcible overthrow of the government' referred to in the *Yates* case does not include constitutionally protected activities such as speaking, publishing, or writing letters to public officials, unless those means of public persuasion are used to advocate forcible overthrow of the government" and, that "the defendant could not be found guilty 'if the activities incited by the Communist Party include only such means of public persuasion as are used to voice opinions on public issues of foreign and domestic policy, no matter how unpopular or odious to the majority of

American citizens those opinions may be'" (Pet. Br. 35–36).

We submit that, while one of the prosecuting attorneys at the trial (there were four) did, at one point in the trial proceedings, use language (R. A9, quoted at Pet. Br. 34 and *infra*, p. 62) which suggests that he may have misinterpreted the nature of the incitement-to-action type of advocacy which this Court, in *Yates*, held to be the sort of language prohibited by the Smith Act, the record is clear that the court entertained no such misconception and—what is most important—did not by its instructions and refusals to instruct, as petitioner maintains, permit the jury to base a finding of guilt on the basis of any such erroneous conception.

The Government attorney's remarks were made extemporaneously in the course of oral colloquy with the court as to the admissibility of a certain issue of a newspaper, *The Textile Workers' Voice* (G. Ex. 62 for identification), which the Communist Party published in North Carolina and copies of which were furnished by petitioner to witness Clontz (R. A7; Tr. 1132–1133). One of the articles in this paper, entitled *The Atlantic Pact,* was a vituperative attack on the "treaty called The Atlantic Pact," including a charge that, whereas "the Taft-Hartley Act * * * uses police, soldiers and courts against American workers," the "Atlantic Pact wants to use atom bombs against the workers of the whole world" (R. A8–A9). The article concluded with an appeal to readers to write to their Senators and "tell them to vote this war pact down" (R. A9). On objection and motion

to strike by defense counsel, the court asked government counsel, "How is that relevant * * *?" (*ibid.*). Government counsel made the following reply, which is the basis of petitioner's contention (*ibid.*):

> If Your Honor please, * * * it is directly linked to the defendant and it carries with it what we call his language which incites to action. It is urging action either now or in the future. "Write to your Senators." It expresses the desire of the Communist Party, and we think the language itself is inciting to action.

The court's response to the foregoing, which petitioner neglects to mention, was as follows (Tr. 1137–1138):

> I think that it is connected with the defendant all right, *but I do not see that it has any relevancy to the subject matter of the case.*
>
> *I think the motion should be sustained.* [Emphasis added.][25]

There is thus no basis for petitioner's contention that the trial court erroneously construed the *Yates* decision with respect to the meaning of language which "incites to action." The court's refusal to give the defense's requested instruction No. 7 (*supra*, pp. 60–61), which petitioner cites as proof that the court

[25] Later in the proceedings, after intervening colloquy, the court took under advisement the admissibility of the particular exhibit in question and some six others (R. A13–A14; Tr. 1676–1677, 1705). The court thereafter excluded four of the exhibits, including that which gave rise to the quoted colloquy, and admitted the others (R. A18). The admissibility of the latter is treated *infra*, at pp. 116–119.

misconstrued *Yates* on this point, in no way indicates what petitioner suggests. This instruction was refused because, as the court remarked, "it in effect selects certain portions of the evidence" (Tr. 1937)—contrary to the court's determination not to discuss specific aspects of the evidence in its charge. But the thorough and careful instructions which were given were fully in conformity with those approved by this Court in *Dennis* (341 U.S. at 511–512) and more recently in *Yates* (354 U.S. at 326) as to the kind of advocacy at which the Smith Act is directed, and, in effect, included the substance of the defense's requested instruction No. 7 (R. A37–A40).[26] Accordingly, petitioner's argument on this point cannot be accepted.

(*b*) Petitioner also urges that the admission of testimony of former Party members who had no personal knowledge of petitioner or his activities in the Party, on the issue of the nature and character of the Party, rendered the membership clause unconstitutional as applied. This contention is answered in substance at pp. 113–116, *infra*, where we reply to the argument that the admission of such testimony deprived petitioner of a fair trial. In summary, our point is that (a) the only way to prove what the Party advocated is by the words and teachings of its leading members; (b) the Party is a tightly-knit, well-disciplined group, not a loose, amorphous society; (c) petitioner was a Party leader, active and knowledgable; and (d) he was shown to have the necessary un-

[26] Petitioner, significantly, makes no complaint concerning the instructions which were given.

lawful intent. In these circumstances, it was appropriate, fair, and valid to admit the testimony of the former Party members.

(*c*) The contention that the indictment failed to charge an essential element of the offense is likewise without merit. The argument is that the Government, in order to save the membership clause from being declared void on its face by this Court, has injected a new element into the offense defined by that clause—an element specified neither in the language of the statute nor in the indictment—and prevailed upon the trial court to require the jury, in order to convict, to find this element to be present in this case; it follows, says petitioner, that he has been convicted of an offense with which he has never been properly charged (Pet. Br. 41–44).

It is true that the trial court, at the Government's request, charged the jury that they were required to find that petitioner's Party membership (in addition to being coupled with the requisite knowledge and intent) was an "active" membership (defined as one entailing the devotion of "all, or a substantial part, of [one's] time and efforts to the Party," as distinguished from a mere "nominal, passive, inactive, or purely technical membership" (R. A41)). It is also true that this so-called "activity" factor is not mentioned explicitly in the statute or the indictment. But it does not at all follow that petitioner has been convicted of an offense with which he has not properly been charged.

Following this Court's restoration of the prior appeal in this case (and the *Lightfoot* case) to the

docket for reargument (353 U.S. 979), and before the Court's reversal and remand of those cases because of the production-of-documents errors (*Scales* v. *United States*, 355 U.S. 1; *Lightfoot* v. *United States*, 355 U.S. 2), the Government filed a supplemental memorandum in this Court the purpose of which was "(1) to clarify some aspects of our argument at the last term on the constitutional issue, and (2) without in any wise abandoning our position that the membership clause has been properly and validly applied in these cases, to present certain suggestions as to the disposition of the cases should that position not be wholly accepted by the Court" (Supplemental Memorandum for the United States on Reargument, Nos. 3 and 4, Oct. Term, 1957, pp. 2-3). We pointed out that, in defending the validity of the membership clause on its face, and as applied in those cases, we had urged that the clause does not apply to "a merely passive status," but solely to "active membership" in a society of the type defined in the Act, with the requisite knowledge and intent (*id.*, p. 2). We further pointed out that, since neither jury had been specifically instructed that a finding of such *active* membership was requisite to conviction, there was implicit in our argument the idea that the determination that the membership be of an active quality was not required to be made by the jury, but could be made by the trial court—in the same manner that a finding of the existence of a "clear and present danger" is one which is properly made by the court (*ibid.*). We emphasized that we were *not* suggesting that the "activity" factor was to be considered "an element of

the crime established by the Smith Act, to be proved in addition to" membership, knowledge, and intent, but, rather, that it was a "controlling constitutional standard by which to test whether the membership clause of the Smith Act has been validly applied in a particular case" (*id.*, pp. 3–4)." In recognition, however, of the possibility that the Court, while accepting our position that only *active* membership is punishable under the Act, might be of the view that the determination of whether the membership is or is not of an active quality is for the jury to decide, we suggested that it would be desirable for this Court to give guidance to the trial courts as to the contents of a proper instruction (*id.*, p. 5) and set forth what

" As we said in our Supplemental Memorandum, statutorily the crime is fully proved by sufficient evidence of membership, knowledge, and intent, but the "activity" test then determines whether the conviction can be allowed to stand under the Constitution. Just as the finding of "clear and present danger" is not an integral element of the various offenses under the Smith Act, but an external constitutional limitation on the validity of convictions under the Act which are otherwise proper, so the factor of "activity" plays the same limiting role with respect to the membership clause.

For this reason—that the "activity" factor is not an element of the offense but an overriding constitutional test—the determination of "activity" is not for the jury but for the court, on the basis of its own evaluation of all the evidence adduced by both sides. With respect to this determination, as well as for the "clear and present danger" finding, "[t]he question * * * is whether the statute which the legislature has enacted may be constitutionally applied. In other words, the Court must examine judicially the application of the statute to the particular situation, to ascertain if the Constitution prohibits the conviction. * * * Bearing, as it does, the marks of a 'question of law,' the issue is properly one for the judge to decide" (*Dennis* v. *United States*, 341 U.S. at 514–515).

we thought would be an appropriate charge on the point (*id.*, pp. 6–7).

As previously noted, the Court thereafter, without hearing reargument, remanded the cases to their respective Courts of Appeals solely on account of the production errors. Although the Court, in remanding, was silent with respect to the subject matter of our Supplemental Memorandum, the trial court, at the re-trial of the instant case, incorporated (at the Government's request) the substance of our suggested charge in its instructions to the jury (R. A41). The reason for the Government's request and for the court's acquiescence is thus clear: to guard against the *possibility* that this Court might hold such a charge necessary to a valid conviction under the membership clause. We have never thought the inclusion of such a charge was *necessary,* and do not now.[28] Our request was purely a precautionary measure, designed to forestall the possible need for a third trial, necessitated because of the absence of a charge which might just as well be included in the instructions given at the second; our primary position remains what it was before—that the "activity" factor is a controlling constitutional standard, to be applied by the *court,* by which to test whether the membership clause has been validly applied in a particular case.

In the light of these circumstances, we submit that

[28] Unlike petitioner (see Pet. Br. 42, fn. 44), we fail to see any inconsistency between the Government's action at the trial in requesting the charge on "activity" and its argument in the Court of Appeals that the instruction was "unnecessary," and, in the light of the circumstances as outlined in the text, submit that there is none.

there is no substance to petitioner's claim that the Government and the trial court have injected into the membership clause a new "element of the offense," which Congress has failed to define. And by the same token there is no merit to the argument that petitioner has been unconstitutionally convicted of an offense with which he has never been charged.

II. SECTION 4(F) OF THE INTERNAL SECURITY ACT OF 1950 DOES NOT AMEND THE MEMBERSHIP CLAUSE OF THE SMITH ACT SO AS TO EXEMPT MEMBERSHIP, WITH KNOWLEDGE AND INTENT, IN THE COMMUNIST PARTY

A. Section 4(f) of the Internal Security Act of 1950 (Pet. Br. App. 3a–4a) provides that "[n]either the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute." Petitioner argues that this provision limits the scope of the Smith Act so that the membership clause no longer applies to membership in any Communist organization (Pet. Br. 44-50). The argument is plainly refuted by the statutory terms; Section 4(f) refers only to membership "per se" whereas the Smith Act punishes membership, not "per se," but coupled with knowledge and intent. And petitioner's effort to find in legislative history the unlikely repealer the language of 4(f) does not effect is demonstrably unsound.

Perhaps the use of the term "membership clause" to describe the pertinent provision of the Smith Act is the primary source of plausibility in petitioner's argument, since it carries the implication that mere "membership" as such is proscribed. The language

of the Act dispels this misconception, declaring explicitly that it is limited to anyone who "becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, *knowing the purposes thereof*" (emphasis added). In addition, as we have shown (*supra*, pp. 47–48), the membership provision of the Smith Act requires for conviction an intent to achieve the group's unlawful purposes as speedily as circumstances permit. Unless those requirements of knowledge and intent are ignored, or the reference in the Security Act to membership "per se" is misread to mean membership plus knowledge plus intent, the application of the Smith Act to the offense here charged was not affected.

Petitioner suggests no reason for ignoring the words "knowing the purposes thereof" in the Smith Act. In this case, the court below on the former appeal not only noted their presence, but specifically decided that they added the element of knowledge as an esential part of the offense (*Scales* v. *United States*, 227 F. 2d 581, 589), and the differently constituted Court of Appeals on the instant appeal adhered to and reaffirmed these views (R. 460–461). This interpretation has been approved by the Seventh Circuit in *United States* v. *Lightfoot*, 228 F. 2d 861, 871, reversed on other grounds, 355 U.S. 2, and by the Second Circuit in *United States* v. *Noto*, 262 F. 2d 501, 508, pending on petition for a writ of certiorari, No. 564, Misc., this Term. See also *Dunne* v. *United States*, 138 F. 2d 137, 143 (C.A. 8), certiorari denied, 320 U.S. 790. When this critical difference in express terminology is coupled with the *Dennis* principle

(*supra*, pp. 47–48) requiring the further element of intent for conviction under the Smith Act, no room is left for finding in the membership "per se" exemption under the Internal Security Act an absolution for those Communist Party members who have the requisite knowledge and intent.

What petitioner's argument amounts to is the linguistically untenable claim that when Congress used the language "membership * * * per se" it meant "membership plus knowledge and intent * * * per se". This argument is inherently improbable in view of the use of the language "per se", which must have been inserted to refer to naked membership. Unless the very word "membership" includes within itself the concepts of knowledge and intent, petitioner's argument is basically inconsistent with the Act. This Court has recently recognized that Congress can legislate and has legislated with respect to membership without either knowledge of the aims of an organization or intent to carry them out. *Galvan* v. *Press*, 347 U.S. 522, 526–528. In that case the Court held an alien deportable on the basis of membership alone without proof of knowledge of the aims of the organization. Moreover, petitioner himself agrees—in connection with his discussion of the constitutional issues—that "membership" can and does exist without knowledge of the organization's aims and without any intent to foster or achieve them.

B. Since the petitioner can find little comfort in the language of the two Acts, he seeks support in what he terms "logic and legislative history" (Pet. Br. 47). Neither the precursor bill (H.R. 5832, 80th

Cong., 2d sess.) nor the initial versions of the bills (H.R. 9490, S. 2311) in the 81st Congress, which eventually passed as the Internal Security Act, contained anything comparable to Section 4(f). Apprehension then arose that the registration provisions (finally enacted as Sections 7 and 8, 50 U.S.C. 786, 787) might be held unconstitutional under the Fifth Amendment on the ground that other provisions of the Act (Sections 2 and 4(a)) might be construed to make membership in the Communist Party in itself illegal, so that all of the proof necessary for conviction could be obtained from the registration provisions.[29] When the Senate Judiciary Committee sought to meet this objection by inserting in S. 4037 (81st Cong., 2d sess.) a provision like present Section 4(f), but applicable only to Sections 4(a) and 4(c) of the bill, certain Senators raised on the floor the objection that under this provision the registration provisions might still be claimed to incriminate members because of the Smith Act.[30] In response to this objection, the final version of the bill as it came from conference contained the present language of Section 4(f); there can be no doubt that it was drafted with the Smith Act in mind.

This is a long way from an intention to modify the

[29] These doubts were expressed in a letter from the late John W. Davis to Senator McCarran, dated February 10, 1950 (96 Cong. Rec. 15258), a report from Attorney General Clark (96 Cong. Rec. 14597), and a statement by Senator Langer (96 Cong. Rec. 15204).

[30] Senator Kefauver (96 Cong. Rec. 15198), Senator Humphrey (96 Cong. Rec. 14479), and Senator Lehman (96 Cong. Rec. 14190) raised this point.

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Smith Act so that membership in the Communist Party, plus knowledge of its aims, plus an intention to promote such aims should no longer be covered. The most that can be said is that Congress intended the Smith Act to be read with Section 4(f) as an aid to interpretation so that it would not be held applicable to membership alone, much as this Court read the Sherman Act and the Norris-LaGuardia Act together in *United States* v. *Hutcheson,* 312 U.S. 219, to determine the extent of the exemption from criminal sanctions granted to unions. There is no adequate ground for the improbable conclusion that the Congress which passed the Internal Security Act meant thereafter to exempt Communists, objects of particular concern, from the membership clause of the Smith Act. If that clause did not cover Communists, it would be unlikely to cover anybody.

Elsewhere in the Internal Security Act, Congress gave further evidence that Section 4(f) was to mean only what it said, and not to provide the immunity petitioner seeks from it. Plainly, the extensive findings in Section 2 of the Act (50 U.S.C. 781) as to the menace of the Communist Party hardly comport with petitioner's effort to expand the immunity under Section 4(f) beyond what its terms require. And, to make sure, Congress added in Section 17 (50 U.S.C. 796):

> The foregoing provisions of this title shall be construed as being in addition to and not in modification of existing criminal statutes.

As to the "logic" of petitioner's position, it does not follow, as he suggests, that merely because no

criminal law at the time of the Internal Security Act forbade membership *per se*, one must assume the repeal of the nearest thing, *i.e.*, membership plus knowledge plus intention. True, since the membership clause does not apply to membership *per se*, but only to membership when coupled with these subjective states (knowledge plus intent), it was not, strictly speaking, necessary for Congress to include in Section 4(f) the phrase "or of any other criminal statute" in order to insure that the membership clause would not be deemed to apply to such naked membership. But petitioner's argument that this proves that by those words Congress must have intended to effect "immunity from prosecution [under the membership clause]" (Pet. Br. 48) for Communist Party members who *otherwise* come within the purview of that clause—*i.e.*, persons who, in addition to being members, have the requisite knowledge and intent—is based on the most mechanical "logic" indeed. It imputes to Congress a legislative intent which there is not the slightest evidence to suggest that Congress had. The obvious method of accomplishing what petitioner argues Congress meant to do would have been to amend the membership clause directly and unambiguously. What (we submit) Congress meant to do in inserting the disputed language into Section 4(f)—doubtless out of an abundance of caution in its concern to safeguard the constitutionality of the registration provisions and thus ensure their enforceability—was to eliminate any conceivable doubt that the membership clause was not to be deemed applicable

to *mere* membership in a Communist organization, without more.

Mere membership is a far different concept, as we have stressed under Point I, *supra,* from membership plus knowledge plus intent. There is no reason to believe that Congress, in enacting Section 4(f), desired to treat them on a par. As suggested above, it is far more logical to assume that Congress wished to treat them differently and intended Section 4(f) as an aid to interpretation not only of Sections 4(a) and 4(c) of the Internal Security Act, which also do not on their face outlaw mere membership, but also of the membership clause of the Smith Act.[31]

In sum, the language of the various statutes, their legislative history, and logic all lead to the conclusion that membership in the Communist Party, *standing by itself,* should not be made criminal. This leaves unaffected the present case, where the statutory prohibition, the indictment, and the evidence all encompass not only membership in the Communist Party but knowledge of its unlawful aims and an intent to promote those aims.

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[31] Similarly, the decision of Congress not to adopt Senator Humphrey's suggestion in 1954 to proscribe membership in the Communist Party with knowledge of its purposes, on the ground that it would fortify the claims to self-incrimination under the registration provisions (see Pet. Br. 49–50), adds nothing to petitioner's previous argument. It merely shows that Congress was as concerned in 1954 as it was in 1950 to take no action which, under even the most liberal interpretation, would endanger the enforceability of those provisions.

## III. THE EVIDENCE FULLY SUPPORTS THE VERDICT

### A. THE EVIDENCE AS TO THE CHARACTER OF THE PARTY'S ADVOCACY OF VIOLENCE MEETS THE *YATES* STANDARD OF A CALL TO FORCIBLE ACTION AT SOME FUTURE TIME

In *Yates* v. *United States,* 354 U.S. 298, this Court construed the Smith Act's teaching and advocacy clause as referring to the teaching and advocacy of violent governmental overthrow in the sense of a call to forcible action to that end (pp. 312–333). The clause makes illegal "advocacy directed at promoting unlawful action", the Court held, as distinguished from "mere doctrinal justification of forcible overthrow" or the advocacy of force "as an abstract principle" (pp. 318, 321).

In thus distinguishing between "advocacy of abstract doctrine" and "advocacy of action" (354 U.S. at 320), however, the Court was careful to point out that the "action" advocated, to come within the Act's proscription, was not required to be present action, or immediately impending action, or even action to be taken at a fixed or foreseeable future time. Referring to the fact that what "was condemned in *Dennis*" was "*indoctrination* preparatory to action", and adverting to "the holding in *Dennis* that advocacy of violent action to be taken at some future time was enough", the Court epitomized its ruling as relating to "advocacy or teaching in the sense of a call to forcible action *at some future time*" (354 U.S. at 320, 322, 329; emphasis added). When this time will occur is, necessarily, not calculable in advance. For, as the Court noted, the summons to present, or imminent, action will not come until "the time [is] ripe" (354

U.S. at 332). And that will occur only when the Party's leaders "fe[el] that the time ha[s] come for action" (*Dennis*, 341 U.S. at 511)—at the historic coincidence of the so-called "objective" and "subjective" conditions of which the witnesses in this case spoke (*infra*, pp. 123–124, 130, 132). Both *Dennis* and *Yates*, in short, make clear that the particular time in the future when the action advocated is to take place is unimportant so far as enforcement of the advocacy clause of the Smith Act is concerned; what is essential is that it be in fact *action* that is advocated, *i.e.*, forcible action to be taken by the persons to whom the advocacy is addressed, whenever the signal for such action is received from the Party leaders.[32]

It remains, then, to consider whether the evidence adduced at the trial below as to the character of the Party's advocacy during the pertinent years (1946–54) meets the evidentiary standard of "advocacy of

[32] Obviously, this signal will not be given until the Party leaders think that the venture's prospects of success are good. As Party leader Doxey Wilkerson told witness Clontz, the Party wants a successful revolution, not "martyrs" (*infra*, p. 135). It is equally evident that if the signal is long delayed—if the "objective" and "subjective" conditions for successful violent revolution in a given country or area of the world are long in coming to pass—not all of those who have been indoctrinated and readied for action over the years will be present to participate in the actual uprising or "*putsch*" (*Dennis*, 341 U.S. at 509). It is clear, however, both from *Dennis* and *Yates* that neither of these imponderables is a bar to the present enforcement of the Smith Act's prohibitions against present advocacy of future violence.

action" thus articulated in the *Yates* case.[33] We submit that it does. That evidence has been summarized in detail in Appendix A, *infra*, pp. 121–139, and at pp. 6–23, *supra*. It appears from that summary that there was adduced at this trial precisely the evidence which *Yates* held was needed to support a finding of Party advocacy of force and violence—evidence of systematic, personal indoctrination, not merely in the abstract principles and tenets of Marxism-Leninism, but in the necessity that Party members personally take part in the ultimate violent seizure of power in this country (under the Party's leadership) which the evidence so clearly established is and has always been the Party's ultimate aim and objective.[34]

[33] In *Yates*, the charge was that the defendants themselves had conspired to advocate violent revolution. (They were also charged with having conspired to organize as the Communist Party a society of persons who so advocated, but this portion of the charge was invalidated by this Court on grounds not now pertinent.) In a "membership" case, such as this, the charge is membership in an organization (namely, the Communist Party) which during the pertinent period so advocated, with the requisite knowledge and intent. The *Yates* holding of what properly constitutes advocacy of forcible overthrow under the Smith Act is thus equally germane and relevant to a membership case. The difference is that, whereas in a "conspiracy to advocate" case (such as *Yates*) it is necessary to prove that *the defendants*, personally, conspired to engage in the forbidden advocacy, in a "membership" case it suffices to prove that *the Party* (as such, and not necessarily including the defendant) engaged in the forbidden advocacy *and* that the defendant was a member of the Party with the necessary knowledge and intent.

[34] As petitioner points out (Pet. Br. 52), this Court had occasion in *Yates* to consider the evidence *in the Yates record* that the Communist Party advocated the forcible overthrow of the Government, and found such evidence wanting in respect of

An essential aspect of this personal indoctrination—explicit at times, but always implicit at the least—was the urging of all Party members and pupils in the multitudinous schools and classes which were so unceasingly being conducted to join forces with all other Party members at the critical time (when the "time was ripe" and the "signal was given") and personally take part in the forcible overthrow of the Government. In other words, this record compels the conclusion that it was the intention of the Party leaders and teachers, in indoctrinating Party members and pupils in the numerous classes and schools and personal briefing sessions held throughout the country ever since 1945, to advocate to such Party members and pupils—not merely that it would be a good thing if somebody, someday, overthrew the Govern-

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the requisite advocacy of forcible *action*. (The occasion of the Court's consideration of the *Yates* evidence on this issue was its inquiry into whether the Party could justifiably be viewed as "the nexus between these petitioners and the conspiracy charged" (354 U.S. at 330).) This determination, however, was limited to the proof on that issue adduced in that case. It is the Government's position in this case that the kind of proof which the Court found wanting in the *Yates* record concerning the nature of the Party's advocacy is present in this record. We disagree entirely, in short, with petitioner's contention that "the evidence in the two cases [*Yates* and the case at bar] is substantially identical" (Pet. Br. 52). With the exception of witness Lautner, not a single one of the witnesses in this case who testified with respect to the Party's advocacy of forcible overthrow—Hartle, Clontz, Childs, Reavis, Cummings, Duran and Jones—testified in *Yates*. Nor was the testimony of these witnesses a mere duplication, as petitioner claims, of testimony found wanting in *Yates*. See our discussion, *infra*, pp. 78–85, concerning significant aspects of their testimony, viewed in the light of the *Yates* standards.

ment by force and violence—but that they take part, *personally,* in a future violent seizure of power, when conditions are right and the summons to immediate action is received from the Party's leaders.

Thus, when the petitioner told witness Clontz in the course of his extensive personal indoctrination of that Party recruit that "we Communists in this country would have to start the revolution" and "could not expect the Soviet Union to land troops to start" it, but that, on the other hand, "we would have the benefit of" Russian help from the outset and "we naturally would continue to receive" such help until the revolution was victorious, etc. (*supra,* pp. 15–17). he was not indulging in "mere doctrinal justification of forcible overthrow" (*Yates,* 354 U.S. at 321), nor engaging in "advocacy in the realm of ideas" (*id.,* p. 320). He was indoctrinating Clontz in his duty, as a tested and disciplined Party member, to join forces with other Party members, when the time was propitious, in forcibly overthrowing this Government. He was advocating action—personal and violent action—by Clontz himself.

Again, when petitioner told Clontz that "it would be nice if revolutionary ideas would automatically produce a revolution," but that that "was impossible, that a militant force would have to bring about the revolution and that force was the only answer" (*supra,* p. 10), he was engaging in "indoctrination preparatory to action" (*Yates,* 354 U.S. at 322). This is equally true of the statement he made when he called Clontz's attention to the familiar passage in Stalin's *Problems of Leninism* in which Stalin rhetor-

ically asks—and answers emphatically in the negative—whether "such a radical transformation of the old Bougeois order" can "be achieved without a violent revolution"; petitioner "pointed out" to Clontz at that time, Clontz testified, that "this particular passage * * * simply prov[ed]" what he (petitioner) "already had taught"—that "education and reform would accomplish absolutely nothing" and that "violent revolution was the only possible way" to achieve the Party's objectives (*supra*, p. 15). Nor was petitioner engaging in mere advocacy in the realm of ideas when he urged Clontz to read Communist Party literature because it would "help prepare [him] for the time when the Communist Party would *call on* [*him*] *in time of crisis*" (*supra*, p. 11; emphasis added).[35] Indeed, the entire series of briefing sessions and personal conferences which petitioner had with Clontz (*supra*, pp. 8–19) were part and parcel of, and collectively constituted, a "call to forcible action at some future time"—a call which was being made upon Clontz by petitioner in the latter's official capacity

[35] Cf. Scarletto's testimony in the *Yates* case that he was surreptitiously indoctrinated in methods of moving "masses of people in time of crisis" (354 U.S. at 332). The Court indicated in *Yates* that this was the sort of evidence for which an appellate court should look in reviewing a Smith Act conviction. "It might be found, under all the circumstances," the Court said, "that the purpose of this teaching was to prepare the members of the underground apparatus to engage in, to facilitate, and to cooperate with violent action directed against government when the time was ripe" (*ibid.*). This, we submit, is what the evidence in this case overwhelmingly shows was the purpose of the indoctrination courses, classes, and briefing sessions which the Party as an organization and petitioner personally conducted for the benefit of Party members and recruits.

as a leader of the Party—in the sense of the *Yates* holding (354 U.S. at 329).

Petitioner was not the only Party leader shown by the evidence to have advocated forcible overthrow of the Government in the sense of a call to action. Consider, for example, the statements and teachings attributed by one of the witnesses to Party leader Art Bary, the District Organizer for a seven-state District in the Rocky Mountain area. As testified by witness Duran, Bary told the members of his Communist Party class in Evergreen, Colorado, that when the time for the revolution came "we would have to set up barricades, establish a central point from where we would participate from." "[B]ecause during the revolution it may become necessary to ebb, retreat in certain battles," Bary further told them, "we would have to learn to retreat in an organizational way * * *" "In the ebbing we were to see that we ebb before the enemy wiped everybody out. Ebbing to the central point that had been barricaded, reorganization, and then at the correct time start flowing forward in the revolution" (*infra,* pp. 138–139). *"We,"* it is to be noted, are to engage in all this action. Bary was plainly doing more than "doctrinally justifying" revolutionary violence to his pupils, or simply defending violent revolution "as an abstract principle, divorced from any effort to instigate action to that end" (*Yates,* 354 U.S. at 318).

Similarly, at the National School for Mexican Cadres, conducted in 1951 in Los Angeles, Party leader Alberto Moreau, a member of the Party's National Education Commission, systematically indoctri-

nated his students in the need to "smash," "by force and violence," "the entire state machinery of the Bourgeoisie" as a preface to the bringing about of the "Socialist system" which all desired. "[F]irst we teach the people the desirability of overthrowing them [the capitalists]," counseled Moreau, "and then when the time is ripe we could stampede them against the capitalist class" (*infra,* pp. 137–138). Moreau also "stated to the class in a very emotional manner that he could see himself carrying a gun against the capitalist S.O.B.'s." And it was important, he stressed, that following the successful seizure of power the Party "collect * * * from the people" the "guns" with which they had been armed in order to ensure that they not be used in any "counterrevolution movement" (*infra,* p. 138). This sort of talk was certainly concrete and specific.

To cite one further example, the students of Party leader George Siskind, at the conclusion of the 1947 Party Training School in St. Louis, Missouri, were required to take a personal pledge, dictated by Siskind, to carry out the "will of the Party even though it meant to fight and to kill" (*infra,* p. 132). And during the preceding weeks of the School they had been indoctrinated, among other things, in the need to "take over" the citadels of capitalism and "wipe them out" (*infra,* p. 132).[36]

[36] See also *infra,* pp. 127, 128, 131, 132, 134, for other instances of statements and teachings by Party leaders which, we submit, cannot fairly be reconciled with the theory that nothing more than the "abstract principle" of political violence was taught by the Party during the pertinent period in its schools and classes and personal indoctrination sessions.

Collectively considered, the testimony constituted the sort of testimony which this Court, in *Yates*, referred to as meeting the evidentiary requirements of the Act, *viz.*, testimony of "Party classes * * * where there occurred what might be considered to be the systematic teaching and advocacy of illegal action which is condemned by the statute" (354 U.S. at 331). From the extensive testimony of this sort to be found in this case, even more than from the comparable testimony alluded to in *Yates*, "[i]t might be found that one of the purposes of such classes was to develop in the members of the group a readiness to engage at the crucial time, perhaps during war or during attack upon the United States from without, in such activities as sabotage and street fighting, in order to divert and diffuse the resistance of the authorities and if possible to seize local vantage points" (*ibid.*).[37]

To sum up, the evidence amply supports the conclusion that the Party members and pupils in the numerous schools and classes and indoctrination talks which the Party conducted understood that they were being called upon, *personally*, to take part in the

[37] *Yates* also cited, as an example of the type of evidence which would meet proper evidentiary standards in a Smith Act prosecution, testimony in that case from which "it might be found that individuals considered to be particularly trustworthy were 'taken into an 'underground' apparatus and there instructed in tasks which would be useful when the time for violent action arrived" (354 U.S. at 332). Compare the testimony in this case concerning the establishment of an elaborate "underground apparatus," seven levels deep, consisting of the most trusted and disciplined ten percent of the Party membership (*infra*, pp. 133–134). Petitioner himself, in December 1951, disappeared into this "underground" (*supra*, p. 18).

future violent *putsch* which it was the common intention to bring to pass at the earliest feasible opportunity. The Party leaders who conducted these schools and classes and personal briefing sessions intended that their indoctrinees so understand, and, indeed, openly called upon them to join forces with their fellow Party members in the forcible seizure of power when the call to imminent action came. This is what the jury found, under instructions which were carefully framed in the light of the *Yates* decision. And it is this sort of advocacy, we think it clear, that this Court meant when it referred in *Yates* to "advocacy or teaching in the sense of a call to forcible action at some future time" (354 U.S. at 329). For it "cannot [be]," as observed by Chief Justice Vinson in the *Dennis* case, 341 U.S. at 509, "that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If [the] Government is aware that a group aiming at its overthrow is *attempting to indoctrinate its members* and to *commit them to a course whereby they will strike when the leaders feel the circumstances permit,* action by the Government is required" (emphasis added). These words sum up, and fairly epitomize, what it was that the Party, as established by the evidence in this case, was doing during the period covered by this indictment.

In a Smith Act case no less than in other kinds of criminal cases it is for the jury to judge the credibility of the witnesses and to determine what inferences are to be drawn from the evidence (*Pierce* v.

*United States,* 252 U.S. 239, 251), and inferences that might reasonably be drawn must, in deciding whether the evidence is sufficient, be viewed in the light most favorable to the Government. *Glasser* v. *United States,* 315 U.S. 60, 80; *United States* v. *Manton,* 107 F. 2d 834, 839 (C.A. 2), certiorari denied, 309 U.S. 664. On that basis, it is submitted that the jury's finding that the Communist Party, during the pertinent period, taught and advocated the forcible destruction of this Government in the sense of the *Yates* holding, and under instructions which were approved in *Yates,* is fully supported by the evidence.

B. THE JURY'S FINDING THAT PETITIONER KNEW THE PARTY'S CHARACTER AS AN ORGANIZATION WHICH ADVOCATED FORCIBLE GOVERNMENTAL OVERTHROW IN THE *YATES* SENSE, AND THAT HE PERSONALLY INTENDED TO BRING ABOUT THAT RESULT AS SPEEDILY AS CIRCUMSTANCES WOULD PERMIT, IS LIKEWISE SUPPORTED BY THE EVIDENCE

Acknowledging his role as a Party functionary, petitioner contends (Pet. Br. 56–59) that the evidence is insufficient to show his knowledge of the Party's character as a society of persons who advocated the forcible overthrow of this Government in the *Yates* sense, and his intent to bring to pass that result as speedily as circumstances would permit. Of course, petitioner's status as a *leader* of such a rigidly disciplined and indoctrinated organization is in itself strong evidence against the suggestion that he might not have known what the Party was about or might not have purposed the furtherance of its ends. However, the record goes far beyond this and shows not only that petitioner was "in contact with" the Party's aims (Pet. Br. 56), but that he himself actively taught and

advocated the violent overthrow of the Government in the sense condemned in *Yates*.

In the years between 1948 and 1951, petitioner acted as a personal tutor to the witness Clontz, supplying him with volumes of Communist Party literature and explaining to him the Party's vanguard role in the coming proletarian revolution (*supra*, pp. 8–19). As we have seen, some of the clearest evidence in the record that *the Party* advocated this Government's forcible destruction in the *Yates* sense emanated from petitioner's own lips, in his tutoring of Clontz (*supra*, pp. 9-18). Some of this evidence was discussed in the preceding section of this brief (*supra*, pp. 79–81), and it is plain that that evidence has equally cogent force on the issue of petitioner's knowledge and intent.

There is other substantial evidence. Petitioner directed the witness Childs to remain in industry where there were unions because the Communist Party considered that trade unions "are the schools of revolution" (*supra*, pp. 20–21). In 1952, petitioner was instrumental in establishing, and was in fact the director of, the secret Communist Party training school at Walnut Cove, North Carolina, at which Childs and other Party members were indoctrinated in the Party's revolutionary goal and the tactics for achieving it (*supra*, pp. 21–23).

Reflecting and acting upon the revolutionary purposes and teachings of the Party, petitioner explained to Clontz the nature and importance of underground activities (*supra*, pp. 13, 18). He said that "if war came" he would go underground himself (R. 302; Tr.

1113). And in December 1951, during the fighting in Korea, he in fact went underground, pursuant to orders of the national Party headquarters (*supra*, p. 18). In these activities, petitioner gave concrete point to the revolutionary doctrines he taught and followed (see *supra*, pp. 12–13), vividly belying his effort now to deny the evidence of his intimate knowledge and unlawful intent with respect to the Party's objectives.

Given the nature of the offense, it would be absurd to expect, and it is not required, that there be even more extensive evidence in the form of explicit statements by the petitioner himself announcing his knowledge and intent. Those we have summarized are numerous and damaging enough. Together with the unquestioned fact that petitioner was a Party member and its leader in the Carolinas, and bearing in mind the proof of the duties and activities such a role entailed, we submit that on this record it would have been incredible to suppose that petitioner was ignorant of the Party's aims or lacking in intent to help achieve them. At least, the jury clearly had ample ground for finding the requisite knowledge and intent.

The Court of Appeals correctly observed that (R. 478–479):

> The evidence in regard to Scales himself not only reinforces the conclusion as to the character of the Communist Party but justifies his conviction of charges contained in the indictment. * * * [He] was a prominent and active member of the organization, who served as chairman of the Carolina District of the Party

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> and was active in recruiting suitable Party members amongst the university students in North Carolina, and * * * he furnished them with Communist literature and advised and instructed them as to the Party doctrines and arranged for their attendance at established Communist schools where formal classes of instruction were given. He himself was a director of one of these schools and in harmony with their course of instruction, as above described. He himself in his contacts with new members consistently and repeatedly preached the revolutionary doctrine that, in the interest of the proletariat, the institutions of the state must be destroyed by force and violence as soon as it was reasonably possible to do so. He was constantly in touch with the national leaders of the organization and obeyed their instruction that he should go underground under an assumed name.

The court accordingly was correct in concluding that (R. 477):

> Taking this evidence in the light most favorable to the prosecution, which must be done if the historic function of the jury is to be recognized, it is fair to say that, contrary to the appellant's contentions, the allegations of the indictment have been sustained.[38]

[38] Similarly, the Court of Appeals on the former appeal concluded, on the basis of the evidence adduced at the first trial (*Scales* v. *United States*, 227 F. 2d 581, 593):

"* * * Uncontradicted testimony as to statements by him showed that he was thoroughly aware of the unlawful aims and purposes of the party, was in sympathy with those aims and purposes and entered into its activities with complete under-

## IV. PETITIONER RECEIVED A FAIR TRIAL

### THE DENIAL OF PETITIONER'S MOTION CHALLENGING THE COMPOSITION OF THE GRAND JURY WAS PROPER

Petitioner urges that the trial court committed prejudicial error in refusing to grant his motion challenging the composition of the grand jury which indicted him (Pet. Br. 59–61). The pertinent facts are as follows:[39]

After his arrest on November 18, 1954, petitioner first appeared in court on December 7, 1954. His request for a one-week extension for the purpose of securing counsel was granted. On December 16, he again appeared before the court for arraignment, but was still not represented by counsel. The court thereupon appointed two members of the bar to represent him for purposes of the arraignment. On that day, he entered a plea of not guilty, reserving the right to file appropriate motions by January 14, 1955, and specifically reserving his right to challenge the composition and array of the grand jury.

On December 22, 1954, petitioner was released on bail. On January 14, 1955, the date fixed by the court for the filing of appropriate motions, he was represented by a New York attorney who requested sixty additional days in which to file motions. Act-

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standing of what was involved. On the evidence before it, the jury was amply justified in finding him guilty of the crime charged * * *."

[39] The essential facts pertinent to this issue, which are recited in the following four paragraphs, are also set forth in the trial judge's "Finding of Fact, Conclusion of Law, and Order" of April 15, 1955, reproduced in Appendix B, *infra*, pp. 140–145.

ing on this request, the court granted an extension to February 18, 1955, by which time the petitioner was to file his motions, and the court fixed April 11, 1955, as the date for the commencement of the (original) trial. Petitioner's counsel announced complete satisfaction with the dates as set.

On February 18, 1955, petitioner, again represented by new counsel of his own choosing, filed motions to dismiss the indictment on constitutional and other grounds, for a bill of particulars, for the return of seized property and the suppression of evidence, for discovery and inspection pursuant to Rule 16 of the Federal Rules of Criminal Procedure, for pretrial inspection of documents under Rule 17(c), to strike portions of the indictment, and for continuance of trial.

Argument on these motions was heard by the court on March 8, 1955, and at this time petitioner's counsel advised the court of his intention to file a motion challenging the method of selecting the grand jurors despite the Government's announced intention to object to the filing of such a motion on the ground that it would be untimely. Petitioner subsequently filed the motion together with a challenge attacking the method of selecting the trial jury. On April 1, 1955, the court, reserving to the Government its objection to the motion challenging the grand jury, conducted a hearing on the method of selecting jurors, since the evidence as to each of the two motions was necessarily the same in substance. At the conclusion of the hearing, the court denied the motion attacking the grand jury panel because

(1) the motion was not timely filed and

(2) the evidence produced at the hearing failed to show that the method of selecting jurors was improper [Motion Tr. 150–153].[40]

The motion challenging the petit jury also was denied.[41] Thus, each of the two grounds of denial of the motion challenging the composition of the grand jury is independently sufficient to sustain the ruling. We submit that the denial was correct on both grounds.

### 1. *Petitioner waived the right to challenge the composition of the grand jury*

As appears from the facts as just set forth and in the trial court's undisputed findings (Appendix B, *infra*, pp. 140–145), petitioner, after being arraigned on December 16, 1954, was granted two lengthy extensions totaling 64 days in which to file pre-trial motions. At the end of these extensions, on February 18, 1955, petitioner filed numerous pre-trial motions but not the one now in question attacking the composition of the grand jury. This motion was not filed

[40] "Motion Tr." refers to the typewritten transcript of the hearing held on April 1, 1955, on the pre-trial motion challenging the method of selecting jurors.

[41] The trial court observed that a revised list of prospective jurors was being prepared by the jury officials (Motion Tr. 153–154), and when petitioner's counsel agreed that the method of selection of this revised list was satisfactory to him (Motion Tr. 154–164), the court quashed the then existing venire of petit jurors and ordered a new panel drawn under the revised method of selection (Motion Tr. 164), from which the jury which returned the original verdict was selected. There was thus no issue on the former appeal as to the legality of the constitution of the petit jury. Similarly, there is no issue in the present appeal as to the validity of the constitution of the jury which returned the verdict at the second trial.

until March 8, 1955, more than two weeks after the ample extensions granted by the trial court had expired. The court found (Appendix B, *infra*, p. 142), and there is no contrary suggestion, that the information on which this belated additional motion was based had been available to defendant and his counsel from the time of the indictment, and that there had been not even an attempt to explain or justify the inordinate delay.

In these circumstances, as held by the Court of Appeals (R. 493–495), the trial court was clearly justified in rejecting the motion as untimely. Under Rule 12 of the Federal Rules of Criminal Procedure, such a motion must be made before the plea is entered or "within a reasonable time thereafter" when permitted by the court. Failure to present the motion within the prescribed time constitutes a waiver. *Carruthers* v. *Reed*, 102 F. 2d 933, 939 (C.A. 8); *Redmon* v. *Squier*, 162 F. 2d 195, 196 (C.A. 9); *Wright* v. *United States*, 165 F. 2d 405, 407 (C.A. 8); "Notes of Advisory Committee on Rules" following Rule 12, p. 2532 in 18 U.S.C. The Rule provides that "for cause shown" the court "may grant relief from the waiver." But no cause was shown here and there is no basis for questioning the propriety of the decision that the waiver effectively barred the complaint against the grand jury. *Frazier* v. *United States*, 335 U.S. 497, 503; *Shaw* v. *United States*, 1 F. 2d 199, 201 (C.A. 8); *Nations* v. *United States*, 52 F. 2d 97, 99 (C.A. 8); *Moffatt* v.

*United States*, 232 Fed. 522, 528 (C.A. 8); *Hornbrook v. United States*, 216 F. 2d 112 (C.A. 5).

2. *In any event, the complaint is on its merits not ground for reversal of the conviction*

Petitioner premises almost his entire argument on this point upon his allegation that it was impossible for the Jury Commission to know whether the jury box contained the requisite 300 names of qualified persons at the time of drawing (Pet. Br. 60), and that there was, therefore, a failure to meet the requirements of 28 U.S.C. 1864. This contention is rebutted by the evidence adduced at the hearing.

The Deputy Clerk testified that, at the time the indicting grand jury panel was drawn, the jury box contained, as an estimate, "something in the neighborhood of probably five hundred" names (Motion Tr. 83).[42] He further stated that he had been a resident of the county from which the names were drawn for nearly 70 years, had "canvassed the county several times," and had "been in the Legislature several sessions;" that as a result he had a "pretty good knowledge of the people there, their background and their present status;" and that it had been his experience that the jurors drawn for service had represented a "cross-section of all walks of life in [the] community" (Motion Tr. 84–85).

The Clerk of the District Court testified that the

[42] Elsewhere in his testimony he estimated the number of names as "probably four hundred, four hundred and fifty or five hundred, somewhere around there" (Motion Tr. 84). In any event, he was "satisfied," he testified, that the number was "more than three hundred" (*id.* 83).

procedure used by the Commission in selecting names for the jury box[43] had been commended by members of the bar throughout the district and by others for the fairness of the jurors serving in the courts (Motion Tr. 48, 49). This witness also testified that the procedure used had been discussed with inspectors from the Administrative Office of the United States Courts and with other clerks and visiting judges; and that he had found this to be "substantially the procedure followed elsewhere," uncriticized by any of these sources (Motion Tr. 51).

Aside from the foregoing, no testimony was adduced by petitioner as to the number of qualified names in the box at the time of the grand jury selection. It is thus evident that the inference petitioner would have this Court draw falls far short of rebutting the presumption of regularity which attends the work of the Jury Commissioner and Clerk of the court, a presumption which may be overcome only by clear and convincing proof. *Frazier* v. *United States,* 335 U.S.

[43] In selecting names for the grand and petit juries, requests were sent out on form letters, under the joint direction of the Clerk and Jury Commissioner, who constitute the Jury Commission, to men of knowledge, character and standing who knew the people in the respective counties, asking them to send in suitable names for jury service (Motion Tr. 18–30). Upon the return of these forms, the commission determined the eligibility of the names submitted and eliminated those found to be ineligible to serve. The eligibility was determined by the Clerk or Jury Commissioner's personal knowledge of the individuals' names or from comments of the persons requested to send the names. All names not eliminated by this process were then placed in the jury box on separate cards indicating the names and addresses of the persons selected (Motion Tr. 33–35).

497; *Fay* v. *New York*, 332 U.S. 261; *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217. In addition, even if it be assumed *arguendo* that the Jury Commission was not certain that there were 300 *qualified* names in the jury box at the time of the drawing, this fact standing alone is an insufficient basis, without a showing of prejudice, upon which to nullify an indictment."

And, far from suggesting prejudice, the record demonstrates that there was none. The testimony showed that the Clerk never intentionally or systematically excluded any class or group and that he sought a wide selection of jurors from all walks of life (Motion Tr. 47–48). Acting on the express direction of the District Court, the Jury Commissioner made special efforts to secure women and Negro jurors (Motion Tr. 25), and there was no exclusion whatever of minority political or racial groups (Motion Tr. 58). As observed by the court below, "It does not appear from the evidence that any qualified person or class of persons was excluded from jury service or that any disqualified person served on the grand

"'Does this statute mean that there must be 300 names in the box of qualified persons as a condition of any valid drawing of any jurors therefrom? If this was the meaning of Congress it would involve the duty on the part of the commissioners of determining in some reliable manner the question of eligibility, and would have rendered it necessary for the legislature to have proceeded further and to have granted them authority and process for hearing and determining the matter in a *quasi*-judicial manner; but they are not triers, nor have they the power to appoint triers. I do not think this is the meaning of the statute." *United States* v. *Rondeau*, 16 Fed. 109, 111 (E.D. La.).

jury chosen in this case or that the defendant was in any way prejudiced by the procedure" (R. 493).

On this record, petitioner cannot prevail in his argument (Pet. Br. 61) that, because the Clerk and Jury Commissioner sent letters to various individuals and leaders of organizations seeking suggested names, they unlawfully delegated their duties so that the indictment must now be quashed. Disposing of a similar contention, the Court of Appeals for the Third Circuit has said (*Dow* v. *Carnegie-Illinois Steel Corporation,* 224 F. 2d 414, 427):

> The jury officials could in the exercise of their discretion resort to others for the suggestion of names so long as it could reasonably be expected that a cross-section would thereby be obtained, and using the names taken from such a variety of sources does not result in an unlawful delegation of duty by the officials.

The evidence here gives every reason to believe that a proper cross-section was obtained and that the jury officials duly exercised their duty of selection. As the Third Circuit observed in the *Dow* case (*supra,* at 427), such circumstances leave no basis for invoking the rule of *Glasser* v. *United States,* 315 U.S. 60, where the vice was solicitation of names from only a single organization with a resulting list improperly weighted. See also *United States* v. *Dennis,* 183 F. 2d 201, 218 (C.A. 2), affirmed on other issues, 341 U.S. 494; *United States* v. *Flynn,* 216 F. 2d 354, 378–389 (C.A. 2), certiorari denied, 348 U.S. 909; *Walker* v. *United States,* 93 F. 2d 383, 391 (C.A. 8), certiorari denied, 303 U.S. 644.

It may be noted, finally, that, after denying the

motion challenging the grand jury selection as untimely and also on the merits, the trial court observed that a revised list of prospective jurors was then being prepared by the jury officials involved in this case (Motion Tr. 153–154). Petitioner's trial counsel agreed that the method of selection of the revised list of jurors was satisfactory and met all his objections (Motion Tr. 154–164). Accordingly, the court quashed the then existing venire of petit jurors and ordered a new panel drawn under the revised method of selection (Motion Tr. 164). See footnote 41, *supra*, p. 91. It would appear, therefore, that any defect of which petitioner could have made timely complaint has disappeared for the future. In view of the complete absence of prejudice, and apart from other reasons already stated, there is no sound basis in petitioner's tardy motion for invoking the supervisory powers of this Court.

B. THE CONGRESSIONAL FINDINGS IN THE INTERNAL SECURITY ACT OF 1950 AND THE COMMUNIST CONTROL ACT OF 1954 DID NOT PRECLUDE A FAIR TRIAL

Petitioner next urges (Pet. Br. 62) that, without a shred of concrete evidence of prejudice, it must be presumed that he could not have had a fair trial because Congress, in the Internal Security Act of 1950 (50 U.S.C. 781) and the Communist Control Act of 1954 (50 U.S.C. 841), made findings that the Communist Party aims at the violent overthrow of the Government.[45]

[45] This contention was first made by petitioner in his petition for a writ of certiorari to review the former judgment of the Court of Appeals (No. 626, Oct. Term, 1955 [No. 29, Oct. Term, 1956; No. 3, Oct. Term, 1957], pp. 2–3, 44–45.

The argument proceeds on the unrealistic and unacceptable assumptions, without proof, that the jurors (1) were in fact familiar with the statutes in question and (2) ignored the court's instructions to determine the nature of the Communist Party from the evidence before them for themselves, and merely followed unthinkingly the findings of Congress in the Internal Security Act and the Communist Control Act. These assumptions attack the basic premises of the jury system itself. If they are correct, it must follow that every Smith Act conviction which has been returned since 1950 has been erroneous on this ground alone and that the Communist Party, by becoming a threat so grave as to require explicit recognition by Congress and much of the public, has immunized its organizers and members against prosecution. As the Court of Appeals for the Seventh Circuit said, rejecting the same argument, in *United States* v. *Lightfoot*, 228 F. 2d 861, 870, reversed on other grounds, 355 U.S. 2:

> In effect, it is defendant's position that all persons subject to prosecution under the Smith Act are immunized from prosecution indefinitely, or at least as long as the Communist Control Act remains a part of the laws of this nation. We do not agree. If any jury had any such prejudgment, the instructions of the Court cured their error. Furthermore, whether any such belief existed in the mind of any juror, might have been discovered on the *voir dire* examination.

Petitioner was certainly entitled to investigate, in this as in any other case, to determine whether the

jurors might be disabled by bias from trying him fairly. But the conclusive presumption of bias he seeks to establish rests only on a speculative hypothesis which cannot avail to impugn the jury's verdict. Compare *Accardi* v. *Shaughnessy*, 347 U.S. 260, with *Shaughnessy* v. *Accardi*, 349 U.S. 280.

C. THE "JENCKS" ACT'S EXCISION PROCEDURES ARE VALID, AND THEIR APPLICATION TO PETITIONER'S TRIAL DID NOT VIOLATE THE CONSTITUTIONAL PROHIBITION AGAINST *EX POST FACTO* LEGISLATION

Petitioner challenges the validity, in two respects, of the so-called "Jencks" Act (Public Law 85-269, approved September 2, 1957, 71 Stat. 595, adding a new section, § 3500, to Title 18 of the U.S. Code), and further argues that, in any event, its application to his trial violated the constitutional prohibition against *ex post facto* legislation (Pet. Br. 63–64). We show, first, that his challenge of the excision procedures of the Act (subsection (c) of § 3500) is without merit; second, that the question of the validity of the Act's definition of "statement" (subsection (e)) does not arise on this record; and, third, that the *ex post facto* contention is unavailable to petitioner because it is made for the first time in this Court and that it is without substance in any event.

1. *The excision provisions of the "Jencks" Act are fully consonant with due process*

At the re-trial below—which was necessitated because of the error of the first trial court in refusing to order the production for cross-examination use by the defense of prior reports to the FBI by prosecution witnesses touching upon the subject matter of their

testimony[46]—the procedure followed with respect to the production of such reports was (with a qualification to be mentioned; see *infra*, pp. 108–110) that prescribed by 18 U.S.C. 3500, as added by the "Jencks" Act. Subsection (b) of that section,[47] provides that the trial court in any criminal prosecution brought by the United States shall, on motion of the defendant, after a witness called by the United States has testified on direct examination, "order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." The same subsection then directs that, "[i]f the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use." It is then provided in subsection (c)—the subsection here in issue—that:

> (c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such ma-

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[46] *Scales* v. *United States*, 355 U.S. 1, reversing 227 F. 2d 581 on the authority of *Jencks* v. *United States*, 353 U.S. 657.

[47] The full text of the section appears at pp. 7a–9a of the Appendix to petitioner's brief.

terial excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. * * *

Petitioner challenges, on due process grounds, the validity of this excision procedure (Pet. Br. 63–64). Basing his argument on *Jencks* v. *United States*, 353 U.S. 657, he contends that "only a right of full access to witnesses' reports serves to protect the opportunity of the defense for full exercise of its right of cross-examination" (Pet. Br. 64). The argument is untenable for two reasons.

(*a*) Assuming *arguendo* that the *Jencks* decision is based on constitutional grounds (but see *infra*, pp. 106–108), the statutory excision procedure is fully consonant with *Jencks*.

Clearly, the mere fact that a government witness has in the past given a statement to a government agent on matters relating to the subject matter of his trial testimony would not require that *all* past statements by this witness to government agents—on any subject whatever—be turned over to the defense. Petitioner makes no such claim and the *Jencks* deci-

sion makes no such suggestion."[48] It is only statements which *relate to the subject matter of the witness' testimony* that must be turned over. But there is no more reason for turning over to the defense non-germane portions of a witness' statement which is in part germane (because it touches on—but only in part—the subject matter of his testimony) than there is for turning over a statement *no* part of which is pertinent to that subject matter. As the Court of Appeals for the Tenth Circuit has observed, "Surely, if an entire statement can be refused when it does not relate to the subject [of the witness' testimony], it is entirely proper to deny access to a part of a statement on the ground that such part does not have the necessary relationship. * * * Unless some provision is made for the restriction of production to matters related to the testimony of the witness, the door is

[48] On the contrary, *Jencks* clearly indicates that statements of the witness which do not relate at all to the subject matter of his testimony are not required to be produced: "Relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established *when the reports are shown to relate to the testimony of the witness*" (353 U.S. at 669; emphasis added). And in its precise holding the Court said: "We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F.B.I., *touching the events and activities as to which they testified at the trial*" (353 U.S. at 668; emphasis added). Again: "We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses *touching the subject matter of their testimony at the trial*" (353 U.S. at 672; emphasis added).

ened for 'the broad or blind fishing expedition' hich the Supreme Court has condemned" (*Sells* v. *nited States*, No. 5992, decided December 30, 1958, ip opinion, pp. 26–27, pending on petition for a rit of certiorari, No. 691, Misc., this term).[49]

The defendant is fully protected against the possiility of an erroneous or arbitrary ruling by the trial udge as to the non-germane portions of a statement ermane in part. He is entitled under subsection e) of the Act (*supra*, pp. 100–101)—and that procedure was followed here (see opinion below, R. 489–90)—to have the entire statement preserved for inspection by the appellate court, and a determination y that court of the correctness of the trial judge's ulings with regard to excision, in the event that the efendant is convicted and elects to appeal.[50] The tatutory procedure thus protects the accused's proper ross-examination rights while at the same time safeuarding the privacy of government records in which he accused has no proper interest.

Petitioner quotes from the *Jencks* opinion (Pet. Br. 63–64) language which he claims supports his contention that statements to a government agent by a prosecution witness which are relevant in part (be-

[49] To the same effect, see the opinion below at R. 490–491.

[50] The court below stated in its opinion: 'We have examined [the original unexcised reports of the Government witnesses] to determine the correctness of the rulings of the trial judge and we concur in his finding that the excised portions of the reports did not relate to the subject matter of the testimony of the witnesses" (R. 489–490). The reports, in their excised and unexcised forms, have been lodged with the Clerk of this Court for this Court's inspection if it should desire to make a similar determination.

cause they refer in part to matters concerning which he has given testimony) must be made available to the defense in their entirety for cross-examination purposes. But the *Jencks* opinion is careful to limit its ruling as to production of reports to matters "touching the events and activities as to which" the witness testified at the trial, or "touching the subject matter of their testimony at the trial". 353 U.S. at 668, 669, 672; see footnote 48, *supra*, p. 102. The thrust of the opinion, as of the decision, is that only the defense can adequately appraise the value for impeachment purposes of statements of a prosecution witness which *in fact* touch upon or relate to a matter concerning which he has testified. But the question of whether a statement of the witness relates in fact to a subject or topical area with respect to which he has testified is a question which the judge is able to decide without assistance from the defense.

Indeed, the latter question, *i.e.*, whether a witness' statement *does relate to or touch on* his testimony, must be determined by the judge without participation by the defense. For the defense obviously cannot join in that decision without being made privy to the very statement which the Government claims does not relate to or touch upon the witness' testimony and for that reason (since the statement is part of the Government's confidential files) should not be seen by other than authorized persons. Petitioner's contention, in short, begs the question. For his argument is, in essence, that the defense is entitled to see a statement of a witness contained in the Government's confidential files in order to determine for

itself whether the Government is correct in maintaining that the statement, because of its confidential character and because it in no way relates to the subject matter of the witness' testimony, should not be seen by the defense.

If petitioner were correct, it would be difficult to see why the defense would not equally be entitled to examine every statement in the investigative files which had ever been made by the witness on any subject whatever, since the reason asserted why the accused should be made privy to the entire contents of a document relevant only in part would apply with equal force to papers and documents in the files containing statements of the witness wholly irrelevant, in fact, to anything contained in his testimony, *viz.*, to enable the defendant and his counsel to determine for themselves if such is the fact. See the Tenth Circuit's remarks in the recent *Sells* case (*supra*, pp. 102–103). As we have noted, petitioner himself makes no such broad claim; and there is nothing in the opinion in *Jencks* which lends support to any such idea or to the comparable rule for which petitioner does contend. As aptly remarked by the court below (R. 490–491):

> [T]he new statutory procedure does not deny the defendant access to any information which would be helpful to his case. Production of the reports for inspection does not depend upon the permission of Government custodians or the attorneys for the prosecution; and the determination of what portions of the reports should be excised is not left to the Government

but is entrusted to the impartial and experienced judgment not only of the trial judge but also the judges of the appellate courts and the Justices of the Supreme Court themselves, if in their discretion they determine to review the case. * * *

The defense is denied only the opportunity to be heard on the question whether the excised portions of the reports bear on the testimony of the witnesses; and this does not amount to a denial of due process. It does not interfere with any constitutional right to which the defendant is entitled but merely restricts his examination of the Government files which he desires to make, not because he has any reason to believe that they will yield anything helpful to his case but on the chance, which costs him nothing, that something will be turned up that will weaken the prosecution. In this situation it is clearly within the province of Congress to protect the right of the United States to withhold facts which it has gathered and to shield the sources of its information in the public interest so long as no pertinent information is withheld from the defendant. This can be done only by entrusting the determination of relevancy to someone other than the parties to the cause, and the method devised by Congress is obviously fair both to the Government and to the defendant and represents a reasonable exercise of Congressional power. * * *

(*b*) What we have said thus far has assumed *arguendo* that *Jencks* was based on constitutional grounds of due process. We believe, however, that this Court did not in that case purport to lay down a basic rule of constitutional law, but rather (pursuant

to its general supervisory powers over the administration of justice in the federal courts) a procedural principle, analogous to a rule of evidence, to be applicable in federal criminal trials in the absence of a definitive statute. In holding that the trial court had erred in failing to order the production of the statements of Ford and Matusow, the Court said that it was following its prior decision in *Gordon* v. *United States*, 344 U.S. 414. It clarified that decision by holding that (contrary to the views of the lower courts in *Jencks*) "a preliminary showing of inconsistency" between the witness' testimony and his prior statement was not, under *Gordon*, a "prerequisite to" the accused's right to inspect the prior statement (353 U.S. at 666–667). But *Gordon* was decided, not on constitutional principles, but on the basis of "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience" and "[*i*]*n the absence of specific legislation*" (344 U.S. 418; emphasis added). It would follow, therefore, that the *Jencks* decision likewise was based on common law principles, as interpreted in the light of reason and experience, and did not purport to lay down a fundamental principle of due process, beyond the power of Congress to alter or amend by legislation.

In the words of the opinion below, "In the *Jencks* decision the Supreme Court was not dealing with constitutional questions. It was exercising what is described in *McNabb* v. *United States*, 318 U.S. 332, [3]40, [3]41, [as] 'its supervisory authority over the administration of criminal justice in the United States

* * * by the establishment of civilized standards of procedure and evidence'; and Congress, by the passage of the interstitial legislation contained in § 3500 was merely exercising its concurrent power in the same field to provide for a case that the Court did not envisage" (R. 491).[51]

For further discussion, see the Brief for the United States in *Rosenberg* v. *United States*, No. 451, this Term.

2. *The question of the validity of the "Jencks" Act's definition of "statement" does not arise on this record*

The second respect in which petitioner challenges the constitutionality of Section 3500 relates to the definition of "statement" in subsection (e). The term is there defined as (Pet. Br. App. 8a–9a)—

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
>
> (2) a stenographic, mechanical, electrical, or

[51] This conclusion has the support also of such decisions as *United States* v. *De Lucia*, 262 F. 2d 610, 614 (C.A. 7), pending on petition for a writ of certiorari, No. 745, this term; *United States* v. *Spangelet*, 258 F. 2d 338, 340–341 (C.A. 2); *United States* v. *Lev*, 258 F. 2d 9, 13 (C.A. 2), pending on writ of certiorari, Nos. 435, 436, 437, this Term; *United States* v. *Palermo*, 258 F. 2d 397, 400 (C.A. 2), pending on writ of certiorari, No. 471, this Term; *United States* v. *Gandia*, 255 F. 2d 454 (C.A. 2); *United States* v. *Angelet*, 255 F. 2d 383 (C.A. 2); *United States* v. *Miller*, 248 F. 2d 163, 165 (C.A. 2), certiorari denied, 355 U.S. 905. See also *United States* v. *Sheba Bracelets*, 248 F. 2d 134, 144–146 (C.A. 2), certiorari denied, 355 U.S. 904; *United States* v. *Rosenberg*, 257 F. 2d 760, 763 (C.A. 3), pending on writ of certiorari, No. 451, this Term; *United States* v. *Consolidated Laundries Corporation*, 159 F. Supp. 860, 868, n. 15 (S.D.N.Y.).

> other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

This definition, petitioner argues, "is so arbitrary, capricious and unreasonable that it violates the due process clause. Statements by prosecution witnesses may be useful for impeachment whether or not the witnesses signed or subsequently 'approved' them and whether or not they are 'substantially verbatim' or 'recorded simultaneously' " (Pet. Br. 64).

While we think petitioner's challenge untenable because this is an area of trial practice which it is proper for Congress to regulate by statute (see *supra*, pp. 106–108),[52] the question need not be reached here. In this case the *Jencks*-type materials which were in fact turned over to the defense were not limited to "statements" of the type defined in subsection (e), but included agent-prepared summaries (if any) of oral statements made by the witnesses to the F.B.I. The Government, in making available to the defense the records of prior statements to the F.B.I. by prosecution witnesses touching upon the subject matter of their testimony, did not limit itself to statements of the kind defined in subsection (e), but turned over everything which was conceivably demandable under the *Jencks* decision, without regard to the subsection (e) definition. There is, accordingly, no basis for this

[52] See also the Briefs for the United States in *Lev*, *Wool* and *Rubin*, Nos. 435–437, this Term; *Palermo*, No. 471; and *Rosenberg*, No. 451.

petitioner's challenge to the subsection (e) definition; he is seeking to argue, in the abstract, a theoretical question which has no pertinency to the facts of his case.[53]

*3. The contention that the application of the "Jencks" Act to petitioner's trial violated the constitutional ban on ex post facto legislation is unavailable because made for the first time in this Court, and is in any event without substance*

Petitioner's final contention pertaining to the "Jencks" Act is that the application of that Act "in the present case violated the Constitutional ban (Art. I, Sec. 9) on *ex post facto* legislation" because his "alleged crime was committed before the enactment of this statute" (Pet. Br. 64).

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[53] In neither court below did petitioner contend that he had not been shown documents which he was entitled to see despite the limitations of subsection (e) of the statute. Rather, petitioner confined his objections to the excision of portions of documents otherwise made available to him—a point discussed *supra*, pp. 99–108. Because this contention was not raised below the Government had no occasion prior to the filing of its memorandum in reply to the petition for a writ of certiorari to place upon the record the fact which it therein asserted (at p. 9)—*i.e.*, that all relevant documents were made available to petitioner regardless of the subsection (e) limitations of the "Jencks" statute.

In *United States* v. *Lev*, No. 435, this Term, *supra*, failure to make a document available to the petitioner at the trial was held to be harmless error because, were a retrial to be ordered, the document would nevertheless be unavailable to the defense under the new statute. Here, somewhat the converse situation exists: any supposed defect in subsection (e) has no bearing on this case because petitioner was, in fact, shown all that he was entitled to see irrespective of the subsection (e) restrictions.

(*a*) In the first place, this argument was not urged either in the District Court or in the Court of Appeals; it was made for the first time in this Court (in the petition for a writ of certiorari, at p. 28). It is, accordingly, not available to petitioner at this time. Cf. *Yakus* v. *United States,* 321 U.S. 414, 444–445; *Lawn* v. *United States,* 355 U.S. 339, 362–363, n. 16; Rule 51, F.R. Crim. P.

(*b*) In any event, this *ex post facto* contention is on its merits clearly without substance.

We have seen (*supra,* pp. 99–110) that the only provisions of the "Jencks" Act of which petitioner can complain are those relating to the excision procedures prescribed by subsection (c). And, as we have argued (*supra,* pp. 101–106), these provisions are wholly consonant with due process of law and with the holding and rationale of the *Jencks* decision, 353 U.S. 657. It follows that the excision features of the Act did not at all—and certainly not in any substantial sense—alter previously-existing law (as interpreted in *Jencks*). On the contrary, the statute gave statutory sanction to that decision, implementing it by prescribing the mechanics for eliminating non-germane material from the papers and documents required to be made available to the defense. In short, in this respect the Act made no change, even of a procedural nature, in previously-existing law. Accordingly, no *ex post facto* question arises.

But even if it be assumed that the excision clauses of the "Jencks" Act effected a change in previously-existing law, it is clear that the change was, at most, one relating "to modes of procedure only, in which no

one can be said to have a vested right," and which, accordingly, Congress may "regulate at pleasure" (*Hopt* v. *Utah,* 110 U.S. 574, 590). Certainly, these provisions of the Act do not remotely resemble the sort of legislation against which the *ex post facto* prohibition is, characteristically, directed, *viz.*, "penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment" (*Harisiades* v. *Shaughnessy,* 342 U.S. 580, 594). And while "there may be procedural changes which operate to deny to the accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition," it is "now well settled that statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited." *Beazell* v. *Ohio,* 269 U.S. 167, 170 (statute authorizing joint trials for jointly indicted persons *held* not *ex post facto* as applied to prior crime).[54]

For further discussion, see the Government's Brief in *Rosenberg* v. *United States,* No. 451, this Term.

D. INADMISSIBLE EVIDENCE WAS NOT RECEIVED

Petitioner's final contention (Pet. Br. 64–71) is that he was prejudiced by the admission of certain al-

[54] See also *Mallett* v. *North Carolina,* 181 U.S. 589, 592–597 (statute giving state right of appeal); *Thompson* v. *Missouri,* 171 U.S. 380 (statute making admissible an important new type of evidence); *Hopt* v. *Utah, supra,* 110 U.S. 574, 590 (statute making previously incompetent class of persons competent to testify).

legedly incompetent and irrelevant evidence. Complaint is made of three principal types of evidence.

1. It is argued that it was error to admit evidence as to the nature and character of the Communist Party which was not directly linked to petitioner (Pet. Br. 64, 66–71). There is no substance to this contention.

One of the elements of the offense defined by the "membership" clause of the Smith Act—the first element to be proved—is that the group or society was, during the pertinent period, one which taught and advocated the forcible overthrow of the Government. *Knowing* membership in the group must be proved in addition, but the first step, legally and logically, must necessarily be proof of the character of the organization. The only way to prove the character of an organization is to adduce evidence of the authoritative acts, statements, and publications of its officers, leaders, and official spokesmen. To limit such proof to acts and statements of the particular individual charged with knowing membership in the organization (or done or uttered in his presence) is incorrect. If petitioner's contention that this is required were valid, the nature of the Party, a material issue, could never be proved. For the Party is by definition a group. And the group's character could not be known by examining only the acts and statements of an individual member in isolation. This argument harks back to petitioner's effort on the constitutional issue to divest "membership", as used in the Smith Act, of its essential meaning—of its denotation of concert with and adherence to others. Both contentions must

fail because they refuse to take account of the group and collective character of membership in a tightly-knit organization such as the Communist Party.

Of course, where the individual defendant in a membership case is, as here, a high-ranking officer and leader of the Party, proof of the character of the Party may (and would normally be expected to) include (as it did here, *supra*, pp. 8–23, 79–81) individual acts and statements of the defendant himself. But there is surely no merit to the argument that it must be *limited to* such individual acts and statements. As noted by the court below, "That part of the evidence which pertained to the activities of the Party with which he [petitioner] had no immediate connection was relevant, since it tended to prove the allegations of the indictment that the Communist Party of the United States was a group of persons who taught and advocated the overthrow of the Government of the United States by force and violence" (R. 481).[35]

Petitioner necessarily concedes this central point when he admits that it would be competent for the Government to prove what the Party advocates by putting in evidence "its official acts in the form of constitution, by-laws, resolutions, and other officially approved publications and declarations"—even though he may have had no personal role in their drafting (Pet. Br. 67). "If in Smith Act cases against Communist Party members," he says, "the prosecution

[35] And see, on the same point, the opinion of the court below on the former appeal. *Scales* v. *United States*, 227 F. 2d 581, 589. See also, to the same effect, *United States* v. *Lightfoot*, 228 F. 2d 861, 867 (C.A. 7), reversed on other grounds, 355 U.S. 2.

should attempt to prove *the Party's* unlawful advocacy by reference to its official pronouncements as an organization, there certainly would be no basis for objection on the ground that the defendant was not present at the time" (*ibid.*; petitioner's emphasis). This is, of course, true. But in view of the rigorously disciplined nature of the Party organization and its alertness to discover and swiftly punish any deviation from the Party line, it is clear that what the Party truly advocates and what its teachings are is better shown by what it permits and authorizes its officers and leaders, *in practice*, to teach and advocate. It would be wholly unrealistic to restrict the prosecution's proof on this subject to the Party's constitution, by-laws, and other "official" pronouncements when these very pronouncements are shown, by the testimony of the Party's own former leaders (as in the case of witness Lautner), to contain "meretricious and self-serving disclaimers," to use petitioner's phrase—or "double talk," to use Lautner's (Pet. Br. 68).[56]

Nor can petitioner escape the force of this logic by his argument that "[i]f it is secret advocacy in contravention of open Party doctrine that is the basis of the charge [that the Party advocates violent overthrow],

[56] Cf. the Second Circuit's observation in the *Dennis* case, 183 F. 2d 201, 229, affirmed on other issues, 341 U.S. 494 (holding that it was proper to permit a prosecution witness, a former Party leader, to testify that the Party's constitution contained "passages * * * which were understood by the initiate to be only a cover—'window-dressing'—for the violent methods advocated and taught"): "This was so patently competent testimony that it needs no discussion."

then it cannot be proved as against Party member A by what member B said to member C in A's absence" (Pet. Br. 69). Where, as here, the evidence clearly establishes that the defendant-member was a Party leader who was privy to such "secret advocacy" and himself engaged in it, no sound reason exists for limiting the proof of what the Party teaches to his own personal teachings and pronouncements. On the contrary, as we have pointed out, precisely because it is *group* advocacy that is in issue no such arbitrary limitation of the proof on this issue is justified, so long as the defendant is shown (as here) to be an integral and knowledgeable member of the group.

2. Petitioner also challenges (Pet. Br. 65–66) the admissibility—on the ground that they were irrelevant, inflammatory, and prejudicial—of "three documents (G. Exs. 64, 65, and 66) relating to the Korean War" (Pet. Br. 65). These documents, it is claimed, "had no conceivable bearing on the issues in the case" (*ibid.*).

The basis of petitioner's argument in regard to these documents is that any document, declaration, or utterance which does not *directly* tend to establish the character of the Communist Party as an organization which advocates the violent overthrow of the Government is not germane to any issue under the Smith Act's membership clause.[57] This premise is misconceived. As noted by the Court of Appeals, the

[57] See colloquy at R. A23 concerning petitioner's motion for a mistrial based on the admission of and reading from these exhibits.

three documents in question—which petitioner personally delivered to the witness Clontz (R. A20, 311–312; Tr. 1149–1150)—"were clearly intended to blacken the United States and stir up animosity against it and thus weaken its ability to defend itself should a revolution be attempted. [They] clearly served to corroborate the testimony in regard to Scales' activities in securing Party members and promoting the general objectives of the Party" (R. 481). Similarly, the Court of Appeals on the former appeal sustained the admissibility of documents which had as their purpose "the arousing of dissension" on the ground that they "had a direct bearing on the purpose to overthrow the government by force and violence when a favorable opportunity should present itself" (*Scales* v. *United States,* 227 F. 2d 581, 589).

That such were the Party's purposes in publishing and disseminating these documents is particularly true with respect to Government Exhibit 66, *I Saw the Truth in Korea,* whose admissibility petitioner particularly challenges (Pet. Br. 65–66). This exhibit constituted but one item of the prosecution's proof that the Party seeks unceasingly, day by day, to sow the seeds of dissension among the people in an effort to embitter them against their own Government, as part of its long-range strategy of weakening that Government in every way possible, and thus speeding the day when its forcible overthrow will become a practical possibility. To be sure, evidence of the type contained in Government Exhibit 66 would certainly not suffice, of itself, to prove that the Party advocates the forcible destruction of this Gov-

ernment. But it was admissible as tending to establish the true nature of the Party as an organization which knows that its ultimate objective of a forcible seizure of power is unattainable so long as the populace is generally content with its economic and political lot and the system of government under which it lives, and so long as there are no deep fissures in the loyalty and patriotism of the people as a whole.

Such evidence was admissible, in other words, as tending to show that the Party is no mere intellectual or visionary group parroting words of advocacy of force, without either hope of success or realistic plans for achieving its goal, but a serious *action*-organization—an organization which implements its program of ultimate violence with interim plans for preparing the groundwork for the final coup. The disputed evidence tended to reveal the Party as an organization which, by exploiting potentially divisive issues (particularly *vis-à-vis* the Communist world) with a view to stirring up hatred by the people of their own Government and by taking day-to-day steps designed to bring about a state of seething resentment against the Government, works realistically towards bringing about the necessary "objective" conditions (see *infra*, pp. 123–124, 130, 132) which it realizes must be present before any attempt at forcible seizure of power can have hope of success. Since the evidence was in that sense relevant to the nature and character of the Party as an advocate of political violence, it was admissible in the trial judge's discretion. We submit that the documents in question would have been ad-

missible even if they had been received simply as Party documents reflective of the character of the Party as such, and had not been specifically linked to petitioner. In fact, as we have noted, the evidence shows that witness Clontz received each of the documents from petitioner himself (R. A20, 311–312; Tr. 1149–1150).

3. Neither was it error, as petitioner claims (Pet. Br. 66), to receive in evidence "Communist Party teachings concerning a so-called 'Black Belt' of concentrated Negro population, throughout which the Negroes should be regarded as an oppressed 'nation' with the right of self-determination." The Party's teachings on the "Negro Question," particularly with reference to the right of self-determination and the proposed establishment of a separate Negro nation in the South, were shown to be a basic part of the strategy and tactics of the proletarian revolution (R. 22–23, 164–167, 249–250, 256, 280, 315–319, 327–329, 341–343, 383–384, 414–415, 422). Petitioner himself related the "Black Belt" and "Negro nation" concepts to the Party's program of violent revolution (*supra*, p. 9). *Foundations of Leninism* (G. Ex. 5), a basic Communist "classic," and one which petitioner required Clontz to study with special care as part of his indoctrination (R. 262), explains the method by which the Party's program of self-determination is to be used in facilitating the forcible overthrow of "imperialist" governments:

> Leninism has proved, and the imperialist war and the revolution in Russia have confirmed, that the national problem can be solved only in connection with and on the basis of the pro-

> letarian revolution, and that the road to victory of the revolution in the West lies through the revolutionary alliance with the liberation movement of the colonies and dependent countries against imperialism. The national problem is a part of the general problem of the proletarian revolution, a part of the problem of the dictatorship of the proletariat [pp. 78–79].

The "Black Belt" evidence was thus directly relevant to the character of the Party as an advocate of the revolutionary destruction of this Government by force.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

J. LEE RANKIN,
*Solicitor General.*
J. WALTER YEAGLEY,
*Acting Assistant Attorney General.*
KEVIN T. MAHONEY,
PHILIP R. MONAHAN,
*Attorneys.*

APRIL 1959.

# APPENDIX A

## Summary of the Evidence (Not Specifically Linked to Petitioner) That the Communist Party Was During the Indictment Period an Organization Which Taught and Advocated the Forcible Overthrow of the Government of the United States as Speedily as Circumstances Would Permit

John Lautner, a prosecution witness, was one of the leading members of the Communist Party at the national level prior to 1950 (R. 2; Tr. 80–81), having been, at the time of his expulsion in that year, a member of the National Review Commission, the Party's top security body, as well as the Chairman of the New York State Review Commission (R. 3, 6; Tr. 83, 86–87, 312).

Lautner first joined the Communist Party in 1929 (R. 1–2; Tr. 80–81). In 1930 he was a pupil at the Party's National Training School in New York, together with some twenty other students selected from different parts of the country (R. 7–8; Tr. 87–88, 103). Later, in 1941, he again attended this National Training School, together with six other students, all of whom held high Party positions (Tr. 126–128). The School's director, Jacob Mindel, told the students that "normally," *i.e.*, if the "world situation" were different from what it was at that time, they would have been sent to the Lenin School in Moscow, which trained "professional revolutionaries" for the Communist Party (R. 19–20; Tr. 130–131). From 1947 to 1949, Lautner, in turn, was a teacher at various Party schools and classes in New York (Tr. 249, 251, 269, 307–309).

In the 1930 and 1941 national schools Lautner was taught, and in his own classes he himself taught, "that the ultimate goal, the ultimate aim of the Communist Party was to bring about a fundamental change in the economic, social and political structure of capitalism in the States" (R. 105; Tr. 426–427) and that (R. 106; Tr. 427)—

> * * * this fundamental change cannot be achieved peacefully. The United States * * * being the most powerful imperialist country, being the leader of the countries in the so-called imperialist camp, * * * this change will come and it can come as a result of force and violence on the part of wresting power from the capitalist class in this country.

In the 1941 school Stalin's *Problems of Leninism* (G. Ex. 6, Tr. 115) was assigned and the principles contained in the following passage were discussed (G. Ex. 6, pp. 19–20; R. 36–37; Tr. 174–175):

> Can such a radical transformation of the old Bourgeois system of society be achieved without a violent revolution, without the dictatorship of the Proletariat? Obviously not. To think that such a revolution can be carried out peacefully within the framework of Bourgeois democracy which is adapted to the domination of the Bourgeoisie, means one of two things. It means either madness, and the loss of normal human understanding, or else an open and gross repudiation of the Proletarian revolution.[1]

Lautner testified that these principles were taught to be "applicab[le] * * * to the United States at that time" (R. 37; Tr. 175) and that he, in turn, taught

[1] As noted *supra*, p. 15, petitioner once called this passage to witness Clontz's attention and commented on it.

them in his own Party classes in the late 1940's (*ibid.*).

*Strategy and Tactics* (G. Ex. 13, Tr. 157, 158), a collection of excerpts from the writings of Lenin, Stalin, and other authoritative Communist spokesmen, was discussed in the 1941 school and by Lautner in his own classes in the late 1940's (R. 26–27; Tr. 156); among the passages discussed was the following (G. Ex. 13, p. 56; R. 30–31; Tr. 167):

> The revolutionary will accept a reform in order to use it as a means wherewith to link legal work with illegal work, in order to use it as a screen behind which his illegal activities for the revolutionary preparation of the masses for the overthrow of the Bourgeoisie may be intensified. * * * The reformist, on the other hand, will accept reforms as a pretext for renouncing all illegal work, to thwart the preparation of the masses for the revolution and to "rest in the shade" of reforms that have been "bestowed".

Lautner testified that George Siskind, the instructor on Marxism-Leninism at the 1941 school and a member of the Party's National School Commission (Tr. 137), said, in reference to this quotation, that reformism "had nothing in common with Marxism-Leninism" (R. 31; Tr. 168).

In both the 1930 and the 1941 schools, Lautner was taught, and in his later classes he himself taught, that the fundamental change, to be accomplished by force and violence, would be brought about when two "sets of conditions" historically coincided (R. 57–58, 107; Tr. 260–261, 428–429). These conditions, which in Party parlance are referred to as the "objective" and "subjective" conditions (R. 57–58, 107), were explained by Lautner as follows (R. 57–58):

> There are two sets of conditions necessary for a successful Proletarian Revolution. One set [of] conditions is objective and the other set of conditions is a subjective set of conditions. The objective set of conditions are a disruption in the smooth running, the state apparatus of capitalism, a war situation, a war, disruption in the economy of capitalists in the capitalist state, mass unemployment, wide dissatisfaction with the way things are, where the government of a capitalist state has to resort to all types of improvisations to maintain itself * * *. These are one set of conditions.
>
> Now parallel with that, if there is a strong Communist Party in that given country—not necessarily numerically strong. Numerical strength does not decide the strength of the Party. The influence of the Party and leadership, and the ability to exploit a situation determines the strength of [the] Communist Party; not numbers. * * * if there is a strong Communist Party that has and enjoys the influence of the decisive sections of the working class in the basic industries, in addition to that, and enjoys the confidence of other sections of the workers, if also in addition to that, enjoys the confidence of large sections of the so-called allies of the working class, like poor farmers, and in the United States the Negro people, and in addition to that, that the Communist Party is able to neutralize sections of the middle class, when those two sets of conditions exist, then the Proletarian Revolution will be successful.

At that time, in other words, the Party, "carrying out its vanguard r[o]le," will "lead the working class to wrest power from capitalism, and bring about that fundamental change in the social, political and economic structure of our society here" (R. 107).

In all the schools, Lautner testified, the instructors stressed that all Marxist-Leninist principles applied

the United States, and they condemned so-called "American exceptionalism"—the doctrine that the United States is exempt from the basic principles of Marxism-Leninism and that there is a possibility that the "fundamental change in the economic, political and social structure could be achieved [in this country] through an evolutionary process" (R. 29–30, 33–34, 37, 56; Tr. 165–166, 171–172, 175, 259–260). Party leaders and instructors, including Lautner, also repeatedly emphasized that the day-to-day activities of the Party and each of its members must be directed toward realizing the final aims of the Party and that the efforts of every member were being constantly evaluated in this light (R. 58–59, 107–108; Tr. 262–263, 429–430).

At its national convention in 1944, the Communist Party was reorganized as the Communist Political Association (Tr. 524–525). In July 1945, however, a new national convention reconstituted the Communist Party (R. 47–48, 51; Tr. 218, 225, 232–233, 525) and devoted itself to ending the "revisionist" policies of Earl Browder, the former General Secretary of the Party, which were being attacked throughout the Party (R. 39; Tr. 180, 218–220, 535). The convention passed a resolution[2] condemning the "opportunist errors" of Browder (Tr. 538), which witness Barbara Hartle, a member of the Resolutions Committee (Tr. 532), explained as meaning "pursuing a social democrat or peaceful road to socialism * * * instead of a

[2] The resolution was published in *On the Struggle Against Revisionism* (G. Ex. 23; Tr. 228, 233, 538), which contained the basic documents of the convention and was used to reeducate Party members returning to civilian life following their army service (Tr. 537), as well as in the September 1945 issue of *Political Affairs* (G. Ex. 24; Tr. 227, 233), the Party's official theoretical organ (Tr. 209–210).

revolutionary road to socialism" (Tr. 538). Mrs. Hartle said that the term "opportunist errors" was used because it was more acceptable to the working class while having a "basic meaning of a great deal more to Marxist-Leninists" (Tr. 538).

In order to implement the new policies, the Party leaders began a revitalized training program in Marxism-Leninism, including classes for beginning, intermediate, and advanced students under the direction of the Party's National Education Commission (R. 51–52; Tr. 243). To guide instructors in these classes outlines were prepared by the Commission (R. 52; Tr. 243), including the *Outline on Fundamentals of Marxism*[3] (G. Ex. 25, Tr. 245, 247). This *Outline* consisted of nine "Lessons," each covering a specific phase or aspect of Marxism-Leninism, and each referring the student to one or more of the Marxist-Leninist "classics," or selections therefrom, as "reading assignments" or "additional reading." These reading assignments included those "classics" (and passages therefrom) which most unambiguously called for the use of force in overthrowing the governments and institutions of the "capitalist" nations. For example, Lenin, in chapter I of his *State and Revolution* (G. Ex. 16, Tr. 181, 184) (one of the study assignments for Lesson IV), chastised Kautsky for having "forgotten or glossed over" the fact that "it is clear that the liberation of the oppressed class is impossible not only without a violent revolution, *but also without the*

[3] This outline was distributed by the Party's national headquarters and was used as a guide by Lautner in classes he taught in Party schools in the late 1940's (R. 52–54; Tr. 244–246). It was also used by Mrs. Hartle in classes she taught in the Northwest District from 1948 until 1950 (R. 179; Tr. 653). In her capacity as District Educational Director, she mimeographed two hundred copies of the outline and distributed them to the sections and clubs of her District (R. 179; Tr. 6[illegible]).

*destruction* of the apparatus of state power * * *" (G. Ex. 16, p. 9, emphasis in the original; read to the jury at Tr. 975). Similarly, Stalin, in chapter IV of his *Problems of Leninism* (G. Ex. 6, Tr. 112, 116) (assigned as "additional reading" for Lesson VII), ridiculed the idea that the proletariat's seizure of power could be achieved "without a violent revolution" (G. Ex. 6, p. 19; read to the jury at R. 36–37, 263; Tr. 174, 1016). "To think that such a revolution can be carried out peacefully within the framework of Bourgeois democracy," he said, "means one of two things. It means either madness, and the loss of normal human understanding, or else an open and gross repudiation of the Proletarian revolution" (G. Ex. 6, p. 20; read to the jury at R. 37, 263; Tr. 174, 1016).

Witness Cummings testified that in December 1945 he was taught, in a class on the role of the Communist Party, conducted at the Party's Midwest Regional School by George Siskind, the school's principal instructor, that "the capitalist system must be overthrown" and that "the only way" that this could be done "was by force and violence" (R. 447; Tr. 933). Siskind further stated that the Communist Party must teach the most militant workers in the shop, just as Lenin instructed the most militant workers in Russia, that "they cannot have peace with the working class without a revolution" and "that it was necessary at times to throw bombs in the machinery" (R. 447–8; Tr. 933). Siskind taught that the United States was in the last, or "imperialist," stage of capitalism and that, because of the unequal development of capitalism in different countries in this stage, World War II had resulted (R. 448–9; Tr. 935). He emphasized that the only solution to unequal development "was the overthrow of the capi-

talist governments, and he said that the only way the capitalist government would be overthrown was by force and violence" (R. 449; Tr. 935). Siskind further instructed his students that they must "hate" and "fight" the "capitalist class," and that, just as "blood ran in the streets in Russia" at the time of the Bolshevik Revolution in that country, so too, "before we would have peace with the capitalist class in America," "blood would run in the streets in America" (R. 450; Tr. 937).[4]

In April 1946, witness Barbara Hartle attended a Party National Training School (called the "Stalin-Foster" School) near New York City (Tr. 548–550). Mrs. Hartle, a full-time Party Worker from 1940 until 1952 (Tr. 809, 753), held numerous Party offices, including membership on both the District Board and the District Committee of the Northwest (Washington, Oregon, and Idaho) District (R. 120–121; Tr. 501–502), and the office of Administrative Secretary of that District (Tr. 523). The "Stalin-Foster" School was part of the Party's re-education program designed to wipe out all remnants of "revisionism"; it was attended by thirty students, all of whom were Party officers, from different parts of the country (Tr. 549–552, 554).

In a class on "The State," the instructor told the students that the United States was a "bourgeois state," which "must be forcibly overthrown by the working class led by the Communist Party" (R. 135;

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[4] On recross-examination, Cummings read to the jury from a report he had made to the F.B.I. at the time he attended the classes, concerning what he had been taught, as follows (R. 454; Tr. 979): "The worker must hate the capitalist class and fight them. It will mean the spilling of blood. We will have streets of blood as they had in Russia. The workers must be organized so when this revolution comes, it must not be a failure. * * *"

Tr. 577–578). Two examples of the revolutionary seizure of a state by force and violence were cited (Tr. 581–582). The first was the "Paris Commune" of 1871 (Tr. 581). The instructor described this as (*ibid.*)—

> * * * the first attempt of the Proletariat to storm the citadels of capitalism, and it was an unsuccessful attempt, but that was described to us as the first time in the history of humanity that the working class, the Proletariat class had made an effort to gain power.

Asked if she was taught "why this effort was not successful," Mrs. Hartle replied (*ibid.*):

> Yes. We were taught * * * that the reason that * * * the Parisian Proletariat didn't retain power was because they did not take sufficient means, sufficient necessary steps, did not use sufficient force to keep that power, and we were taught one of the big mistakes that we made was that in seizing the power they overlooked taking over the banks the same time that they took over the Bastille and some other things like that.

The second example cited by the instructor was "[t]he October, 1917, Revolution in Russia" (Tr. 582).

One of the courses in the school, Mrs. Hartle testified, was on the subject of "The U.S.S.R.," taught by Max Weiss (R. 167; Tr. 639–640), a member of the Party's National Committee (Tr. 237). Weiss taught that "it is not enough in the Communist Party to discuss and study Socialist principles in the abstract, as had been done in Socialist parties and movements in the past," because "today there is a Socialist country in the world, a working class that has gained power, established the dictatorship of the Proletariat, and has exercised that dictatorship and, therefore, the Communist Party studies socialism not in the abstract but

in its concrete manifestations in the Soviet Union" (R. 168; Tr. 640–641). Describing the Bolshevik Revolution of 1917 as "a forcible seizure of power through the destruction of the existing Bourgeois state machine" (R. 171; Tr. 644), Weiss (*ibid.*)—

> * * * taught us that the task that confronted the Russian Proletariat led by the Bolsheviks was, one, the smashing of the Bourgeoisie state machine. He said that the armed forces, courts, prisons, administrative apparatus, police, had to be smashed, that one of the first things that was done was to issue a decree forming a Red Army and Navy, but that it was not possible to form this Red Army and Navy just in a day or two and that the first steps that were taken were to attach commissars from the Bolshevik Party to the old officers' staffs, that immediately Red guard units were formed, and that a workers' militia was established.

It was "possible and relatively easy for the Bolsheviks to take power in Russia," Weiss taught, "because of a number of subjective and objective conditions" (R. 139; Tr. 589). "The objective conditions were that there was a serious situation in the country as the result of the war, World War I"; the "subjective conditions" lay in the fact that "the Bolsheviks were a trained, steeled and tested party" (*ibid.*)[5]

Mrs. Hartle further testified that it was taught at the school that the Communist Party of the United States, "in preparing for the Proletarian Revolution" in this country, should "be guided by the experiences of the Bolshevik Party in Russia at the time of the Russian Revolution"; that Party members in this country "should study very seriously the History of the Communist Party of the Soviet Union, that that

[5] Compare Lautner's testimony, *supra*, pp. 123–124, concerning the "objective" and "subjective" conditions needed for a successful proletarian revolution.

was one volume which more than any other volume would give experience and guidance to the American working class" (R. 173; Tr. 646–647).[6] It was the "plan and program" of the Party, she was taught, when a "revolutionary situation" came to pass, "to lead the working class to seize power, to smash the Bourgeois state machine, establish the dictatorship of the working class or the Proletariat, and then to proceed to reorganize all industry on a Socialist basis" (R. 138–139; Tr. 588). Instructor Weiss pointed out to the class, Mrs. Hartle testified, that the Russian Bolshevik Party was only fourteen years old when it seized power in 1917, and that "if the Communist Party of the U.S.A. had used the same timetable" in this country the "dictatorship of the Proletariat would have obtained in this country in 1934" (R. 168–169; Tr. 641).

Mrs. Hartle further testified that the following passage from *A Letter to American Workers,* by Lenin (G. Ex. 17, p. 16; R. 232; Tr. 798), was taught to the students at the school:

> For the class struggle in revolutionary times has always inevitably and in every country taken on the form of civil war, and civil war is unthinkable without the worst kind of destruction, without terror * * *.

Mrs. Hartle testified that she used the notes and instructions which she received in this 1946 National Training School in various Party training schools at

[6] Lautner testified that when the *History of the Communist Party of the Soviet Union* (G. Ex. 19, Tr. 201–202, 213) was published in 1939 it was strongly recommended by Party leaders and plans for its wide distribution were made (G. Ex. 20, Tr. 206, 207; Tr. 203–207). It became part of the re-education program after the 1945 convention and was recommended in an article in the December 1949 issue of the official Party publication, *Political Affairs* (G. Ex. 21, Tr. 208, 210; Tr. 208–213).

which she taught in the Party's Northwest District from 1946 to 1950 (R. 177–178; Tr. 651–653).

Mrs. Hartle, in summarizing what she taught and was taught as a Party member from the reconstitution of the Party in 1945 until she left it in 1952 (R. 227–234; Tr. 793–801), said that the goal of the Party was the dictatorship of the proletariat, which could only be attained by forcible means (R. 230–231; Tr. 797–798); that "any theory of a peaceful road to socialism, or a growing over from capitalism to socialism was a betrayal of the working class" (R. 231; Tr. 798); and that force and violence would be used to seize control at "that moment in history * * * when both the subjective and objective conditions are ripe at the same time" (R. 233–234; Tr. 800–801).

In April 1947, witness Obadiah Jones attended a Party Training School in St. Louis, Missouri (R. 335; Tr. 1363). Jones was instructed by George Siskind, the principal instructor (R. 335; Tr. 1364), that the "way to attack capitalism was to fight for socialism, and also to take over the capitalist plant, and wipe them out" (R. 344; Tr. 1377). Siskind told his students that socialism "would be obtained through bloodshed, if necessary" (R. 347; Tr. 1381). Jones asked Siskind whether "the capitalists" would "defend themselves," to which Siskind replied, "Yes, they would definitely defend themselves, but there would be no use because there was other Communist nations that would surround the United States and come to the defense of the Communists" (R. 349; Tr. 1397–1398). At the final session of the school, Jones and the other students were required to take a pledge, dictated by Siskind (R. 352; Tr. 1401), promising to carry out the "will of the Party even though it meant to fight and to kill" (R. 353; Tr. 1402).

After the 1948 national convention, the Party began nationally to organize ten percent of its membership in an underground apparatus (R. 84–85, 91, 101–102, 221–224; Tr. 374–375, 387, 398–399, 401A, 725–728). The apparatus consisted of seven levels, each level consisting of groups of three Party members each; each group of three, on each level except the top and bottom levels, was connected with one higher-level group of three and one lower-level group of three (G. Ex. 33, Tr. 379, 381; R. 87–88, 222–223; Tr. 381–383, 725–726, 736).[7] The new organizational structure was developed for security purposes, since each member was known only to six other members (R. 88–89; Tr. 383–384; see R. 222–223; Tr. 726). To further protect the underground from detection, "calling points" for exchanging telephone messages, "drop places" for leaving written messages, and hiding places for Party leaders were chosen (R. 89–90, 224–225; Tr. 384–385, 728–729). National headquarters instructed the Districts to establish large reserve funds for use by the underground (R. 226; Tr. 730). Lautner was instructed in connection with this program to set up two sensitive short-wave radio stations, to have a printing apparatus ready for use by the underground, and to supply the names of Party members who could be trusted with from ten to twenty thousand dollars (R. 90, 95; Tr. 385–386, 391–392). Before Lautner was expelled in 1950, the Party had made considerable progress in implementing its security system in New York (R. 91–104; Tr. 387–402), including the manufacture of mimeograph machines (R. 92–94, 96–97, 100–102; Tr. 388–390, 392–393, 397–400) and the running of a security test (R. 98–99; Tr. 395–396). In the Northwest District at least part

[7] The organization was called *troika*, the Russian word for "three-system" (R. 91; Tr. 386).

of the underground apparatus was established, including a secret courier system to national headquarters complete with points of contact, passwords, and hiding places, reduction in the size of branches from about twenty-five to about fifteen members, and the organization of the branches into groups of from two to five members, with only the group leader knowing who were in the group (R. 222–224; Tr. 726–728).[8]

In the summer of 1950, witness Clontz attended the Party's Jefferson School of Social Science in New York (R. 271–274; Tr. 1031–1032, 1037–1040).[9] In addition to the regular Marxist-Leninist curriculum, Clontz received special instruction from Doxey Wilkerson in August 1950 (R. 276; Tr. 1048). Wilkerson, an instructor at the School (Tr. 313), had been elected to the Party's National Committee in 1945 (G. Ex. 23, Tr. 236; Tr. 237). In order to see Wilkerson, Clontz had to go through a strict security procedure, including the use of special passes which were destroyed by Wilkerson so that they could not be reused (R. 276–277; Tr. 1060–1061). Wilkerson told Clontz that, while some Party members had at one time hoped that the Communists' coming to power "could come about without a violent revolution" (R. 279; Tr. 1063–1064), Clontz (R. 280; Tr. 1064–1065)—

> * * * could forget all this drivel about peaceful means and that the Communist Party recognized and expressed to themselves that the only kind of means would be proper means, which would be forceful means that no longer was there any even pretense among intelligent

[8] In July 1950, witness Hartle went underground herself adopting a fictitious name, staying in her room or apartment as much as possible, and moving frequently from town to town (R. 227; Tr. 732–750).

[9] As shown above (*supra*, p. 17), the arrangements for Clontz' attending this School were made by petitioner.

> Communists that any voting system or any people's election could bring this government.

Continuing, Wilkerson told Clontz that (R. 280; Tr. 1065)—

> * * * the revolution basically would come about by combining the forces of what had been already identified as the Negro nation and the working class, with the Communist Party leading the working class as the vanguard, and that a violent revolution would be necessary to overthrow the Government.

Wilkerson further told Clontz that "the capitalists [in the United States] were speeding their death," and that "if the Korean War was converted into World War III," the "revolution would come much quicker than otherwise would be expected" (R. 289; Tr. 1076). He emphasized, however, that "we Communists did not want any martyrs" and that "the revolution should be started when the time was ripe, and not prematurely" (R. 290; Tr. 1076).

Wilkerson also told Clontz that the Party in the South had been partly underground for a long time and that plans were being made for operation on an individual basis and for secret communications from New York to the rest of the country (R. 282; Tr. 1067). Clontz was advised that, when he returned to North Carolina, he "should remain under cover," maintaining "contact with an undercover Communist club"; that in that way he "would be much more helpful to the Party when the revolution came" (R. 285–286; Tr. 1071–1072).

On one occasion Wilkerson "wrote on a piece of paper" a "formula"—"M–L F & V"—which, he told, Clontz, had been "compounded by the Appellate Courts in the land," and which, he explained, "stood for the proposition that * * * Marxist-Leninist

teachings equal force and violence" (R. 283–284; Tr. 1068–1069). Because of this, he said (R. 284; Tr. 1069)—

> * * * action had had to be taken by the National Party to conceal the fact that their principles and their goal and their aims and their doctrines included forceful and violent revolution.

As part of this concealment process, Wilkerson pointed out (*ibid.*),—

> * * * an official statement had been issued by the Education Commission of the Communist Party U.S.A. disowning or disclaiming certain study outlines, certain texts, certain publications * * *.

The order had "ordered all Communist Party members to turn those in" and "said henceforth, we will not recognize these as official Party publications" (*ibid.*). "[B]y doing that," Wilkerson explained, the Party leaders "established a technicality for Communists on trial and their attorneys" and thus made it "more difficult for Communists to be convicted" (R. 284–285; Tr. 1069–1070). This stratagem would not, on the other hand, "unduly hamper the Communist Party," Wilkerson explained, since (R. 284–285; Tr. 1070)—

> * * * in the future many things would be left unsaid that previously had been said, many things would be left unwritten that previously had been written, * * * for example, in teaching, a mere bare outline would be given, and the instructor would fill in the revolutionary part, or the students would be sent into the Marxist-Leninist works as references to find the revolution, without having it spelled out in the outline.

"[T]hat, naturally," however, Clontz was told, "would not change the basic Party goal or the basic aims of the Communist Party" (R. 285; Tr. 1070).[10]

In March 1951, witness Duran attended the National School for Mexican Cadres in Los Angeles, sponsored by the Party's National Education Commission for highly trusted Party cadres (R. 354; Tr. 1422). Alberto Moreau, one of the instructors at the School and a member of the National Education Commission (R. 357; Tr. 1428), in discussing "the Proletarian Revolution," told the students (R. 360; Tr. 1433)—

> * * * that the Proletarian Revolution would only come about if a Bolshevik rank and file, the sincere Communists, would get out and teach, and teach the people, the desirability of changing the system and the necessity of changing them, and in doing that, we had to teach the people that you cannot change the capitalist system to a Socialist system * * * the peaceful way; it had to be erupted from, and had to be taken away by force and violence * * * and the entire state machinery of the Bourgeoisie smashed, the F.B.I., the courts, and the Army and the Navy, * * * —the entire instrumentality of the Bourgeoisie had to be smashed * * *.

With respect to "the role that would be played by the Communist Party during this period of revolution when the Government would be overthrown by force and violence," Moreau told the students that (R. 361; Tr. 1435)—

[10] Wilkerson illustrated his point by referring to the fact that a certain study outline, which Wilkerson had been using in his instructions, and which Clontz was holding in his hands, was "technically * * * illegal because we Communists have disclaimed it, so that you are holding an illegal document there, actually" (R. 285; Tr. 1070).

> The role of the Communist Party * * * was to play a vanguard role, a leading role; * * * first we teach the people the desirability of overthrowing them [the capitalists] and teach them * * * it could only be done through the Proletarian Revolution, and then when the time is ripe we could stampede them against the capitalist class.

"Marxism-Leninism," Moreau told the class, was neither a "blueprint" nor a "dogma" but a "guidance for action" (R. 362; Tr. 1436). The students, he said, should take back the teachings they learned in the School and, in turn, teach them to their fellow Party members at all Party levels (R. 362–363; Tr. 1436–1437).

In the course of his teachings on the proletarian revolution, Moreau "stated to the class in a very emotional manner that he could see himself carrying a gun against the capitalist S.O.B.'s" (R. 357–358; Tr. 1429). Following the revolution, he told them, it would be important that the Party "collect * * * from the people" the "guns" with which they had been armed during the uprising in order to make sure that they "would not join a counterrevolution movement" (R. 360–361; Tr. 1434).

In September 1952, Duran attended another Party school, in Evergreen, Colorado (R. 375; Tr. 1507). This school was under the direction of Art Bary[11] (R. 375–376; Tr. 1508), the Party's District Organizer for a seven-state District in the Rocky Mountain area and the National Chairman of the Mexican Commission (R. 374; Tr. 1506). At one point in the course, Duran asked Bary whether the transition to socialism was to be "a peaceful transition" or whether "we [were] to fight a Proletarian Revolu-

[11] This individual's name is misspelled in the record as "Berry".

tion" (R. 379; Tr. 1511–1512). In the course of Bary's "explanation of violent overthrow of the Government or peaceful," he (R. 379–380; Tr. 1512–1513)—

> * * * stated that not only would it be that [*i.e.*, violent], but that we would have to set up barricades, establish a central point from where we would participate from; he stated the "we" literally speaking "we," would have to have a central point because during the revolution it may become necessary to ebb, retreat in certain battles, and we would have to learn to retreat in an organizational way and a correct way. It was essential to learn to ebb as it was to flow on the revolution.
>
> In the ebbing we were to see that we ebb before the enemy wiped everybody out. Ebbing to the central point that had been barricaded, reorganization, and then at the correct time start flowing forward in the revolution.[12]

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[12] At an earlier school, held in Estes Park, Colorado, in June 1951 (R. 375; Tr. 1507), Bary taught that the transition from "capitalism" to "socialism" would be analogous to the turning of water in a kettle to steam, with the Communist Party providing the fire under the kettle (R. 377; Tr. 1509–1510). "[T]he American people," he said, "will not and cannot make a successful change over from capitalism to socialism by themselves," but, "like the fire underneath the water, the Communist Party teaches and leads them to where when the society reaches that nodule point, the Communist [Party] * * * leads them to make that abrupt change into the society of socialism" (R. 377; Tr. 1510).

## APPENDIX B

In the United States District Court for the Middle District of North Carolina

No. 4320-G

UNITED STATES OF AMERICA

*v.*

JUNIUS IRVING SCALES

FINDING OF FACT, CONCLUSION OF LAW AND ORDER

This cause having come before the Court by virtue of a motion filed by the defendant to dismiss the indictment because of the illegal selection of the grand jury panel which returned the indictment in the above entitled cause, and the Court having considered said motion and the briefs of counsel for the defendant and for the United States of America on said motion, and having heard such evidence and legal arguments in open court on April 1, 1955, as the defendant and the United States of America desired to present, and having fully considered all the facts as well as the law involved, makes the following findings of fact:

1. That the defendant was indicted by the Grand Jury for the Middle District of North Carolina at Wilkesboro, North Carolina on November 18, 1954 and that the defendant was arrested shortly thereafter in Memphis, Tennessee.

2. That on December 7, 1954, the defendant was brought before the United States District Court, Middle District of North Carolina for the purpose

of arraignment at which time the defendant was without counsel and declined an offer of the Court to appoint counsel.

3. That the defendant was again brought before the District Court on December 16, 1954, at which time the Court appointed counsel to represent the defendant for the sole purpose of arraignment and upon his arraignment the defendant pleaded not guilty.

4. That before the defendant was arraigned the Court entered an order that the plea to the charge in the indictment by the defendant would not constitute, on the part of the defendant, a waiver to his right to file pre-trial motions in this case before the 5th of January, 1955.

5. That upon the request of counsel and acquiesced in by the defendant, the time for filing pre-trial motions was extended from the 5th of January to the 14th of January, 1955.

6. That the defendant failed to file any pre-trial motions by the 14th of January, 1955. However, on this date the defendant appeared in Court with counsel, Mr. Ruben Terris, who, after requesting 60 days extension to file pre-trial motions and a discussion regarding such extension was granted until the 18th of February, 1955, to file any and all pre-trial motions.

7. That the Court set the 2nd of March, 1955, as the date by which replies by the Government to all pre-trial motions must be made and the 8th of March, 1955, for the date of hearing on such motions. The Court at that time also set the 11th of April, 1955, for the trial.

8. That pre-trial motions were filed by Mr. David Rein, counsel for the defendant on the 18th of Feb-

ruary, 1955; That the Government filed its anwers on or before the 2nd of March, 1955.

9. That on the 8th of March, 1955, 23 days after the deadline set for filing pre-trial motions, counsel for the defendant indicated for the first time he might desire to file a motion attacking the grand jury.

10. That the defendant was granted at his first request 29 days from the date of arraignment for filing motions; That he was later granted 35 days more and that he was granted a total of 65 days from the date of his arraignment in which to file pre-trial motions.

11. That the defendant did not file his motion attacking the grand jury until 24 days after the deadline of the 18th of February, 1955, had expired and 88 days after the date of the arraignment, which was the 16th of December, 1954.

12. That the information necessary to support defendant's motion attacking the grand jury was available to the defendant and/or his counsel at the time of his indictment and had been available at all times within the period set by the Court for the filing pre-trial motions.

13. That there was no attempt by the defendant or his counsel to show cause or excuse for the delay in filing the motion attacking the grand jury.

14. That the Clerk of the District Court and the Jury Commissioners of this District would jointly send out to reputable citizens (sponsors) of knowledge and character who knew the people in their community, several different types of form letters requesting each of these sponsors to furnish a list of names of individuals suitable for jury service.

15. That the various form letters would request that the sponsors would furnish on their lists, names of

women, negroes, freeholders and persons affiliated with both the Democratic and Republican Parties.

16. That the word "Freeholder" as set forth in one of the exhibits was by no means a restriction, but was simply the designation of another source to be tapped for the names of prospective jurors.

17. That there was no intimation of any discrimination in favor of or against any particular class, by reason of political or religious faith, or race, color, or sex, or any other classification.

18. That the evidence failed to disclose any delegation of duty by the Clerk of the District Court or by the Jury Commissioner in selection of prospective jurors for service.

19. That the Clerk and Jury Commissioner exercised reasonable screening of the prospective jurors in that the Clerk and Jury Commissioner examined the names and reasonably measured each prospective juror against the statutory requirements.

20. That examination of the prospective jurors was also made by the Clerk and Jury Commissioner by availing themselves of the judgment of persons who were familiar with the prospective jurors and the areas from which they were drawn.

21. That the method used in the selection of Grand Juries was substantially the same for all the divisions of this District except that the prospective jurors for each division reside in that division.

22. That the Clerk of the District Court and the Jury Commissioner supervised and directed the selection of all names of prospective jurors, including those names inserted into the jury box for the Wilkesboro Division of this Court.

23. That there is a new jury box for each division made every five years; in years evenly divisable [*sic*] by five.

24. That the Clerk of the District Court or his deputy and the Jury Commissioner for each respective division when filling the jury box for that division, would insert into the jury box the names of prospective jurors alternately and one name at a time until the jury box contained the number of names required by the Court's Order.

25. That when the Clerk of the District Court and the Jury Commissioner inserted names into the jury box, they did so without any regard to the race, creed, color, sex or political affiliation of such person.

26. That in making up the jury box for each division there was no attempt on the part of the Clerk of the Court or the Jury Commissioner to systematically or intentionally exclude any class or group of persons from the jury box.

27. That from the names in the jury box prospective jurors were drawn and summoned for jury service. That on the reverse side of the summons was a questionnaire asking various questions regarding the name, address, occupation, citizenship, prior jury service, prior convictions, which the prospective jurors were to fill out and return to the Clerk.

28. That, although many questionnaires were not completely answered, the Clerk of the Court or his deputy would examine the answers on each questionnaire.

29. That from the group of prospective jurors summoned nineteen were drawn by a child of tender years to serve as the Grand Jury. That the remaining prospective jurors would form the petit jury panel.

That upon the foregoing facts it is concluded as a matter of law that the motion of defendant to dismiss the indictment in this case because the grand jury was illegally selected was not timely filed. It is further concluded that the evidence did not show any prejudi-

cial defects that would result in a denial to the defendant of any of his rights and that there was not any serious or substantial departure or deviation from the statutory requirements.

Of course, passing on the merits is not necessary because the motion has been rejected for its tardiness, however, the Court feels that, if there is any error in refusing the motion on the time element, it is proper to, and the Court should, pass upon the merits.

The Court denies this motion.

(S) ALBERT V. BRYAN,
*United States District Judge.*

GREENSBORO, N.C., *April 15, 1955.*

U.S. GOVERNMENT PRINTING OFFICE: 1959 O - 526479

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JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

No. 1

JUNIUS IRVING SCALES,
*Petitioner,*

v.

UNITED STATES OF AMERICA

## PETITION FOR REHEARING

TAYLOR, SCOLL, FERENCZ & SIMON
400 Madison Avenue
New York 17, New York

SMITH, MOORE, SMITH, SCHELL & HUNTER
Jefferson Standard Building
Greensboro, North Carolina
*Attorneys for Petitioner*

TELFORD TAYLOR,
MCNEILL SMITH,
*Of Counsel*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

JUNIUS IRVING SCALES,
*Petitioner,*
v.
UNITED STATES OF AMERICA

No. 1

## PETITION FOR REHEARING

Cognizant that petitions for rehearing are rarely granted and that the Court should not be burdened with futile papers, petitioner requests rehearing of the Court's judgment, entered June 5, 1961, on the ground that the Court has disposed of this protracted and controversial case, and has affirmed petitioner's conviction, without passing on petitioner's primary contention with respect to the unconstitutionality of the Smith Act's membership clause *as applied in this case.*

In its opinion, the Court described (29 L. W. 4585) petitioner's challenge to the constitutionality of the statute "as applied" as being essentially concerned with "the sufficiency of the evidence."[1] It is true that petitioner challenged the sufficiency of the evidence in constitutional terms,[2] and the Court's opinion deals with this matter at some length in section III "Evidentiary Challenge" (29 L. W. 4588-96).

---

[1]The Court also mentioned and dealt with petitioner's challenges under the Fifth and Sixth Amendments bearing on the indictment (29 L. W. 4586) and the admission of evidence "not connected up with him or his activities" (29 L. W. 4597). This petition is not directed to those matters.

[2]Pet. Br. No. 488 (Oct. Term 1958) pp. 50-59.

But petitioner's challenge to the constitutionality of the clause as applied in this case relates to the Korean war documents, and specifically to the trial court's refusal to instruct the jury that use of the ordinary means of public persuasion, no matter how odious the opinions voiced, would not in itself be sufficient as proof of incitement. This point was presented *in extenso* and as forcefully as counsel's talents permitted, both on argument in the 1958 and reargument in the 1959 and 1960 terms,[3] and was the focus of considerable colloquy on oral argument.

However, the Court's opinion nowhere mentions this question.[4] This is the more remarkable in that the Court's opinion acknowledges (29 L. W. 4597) that the Winnington pamphlet "may not in itself constitute such an incitement to violence as would justify a finding that the Party advocated violent overthrow . . ." This is precisely what petitioner requested the trial court to charge the jury. That court's refusal so to charge left it open to the jury to find unlawful (i.e. "inciting") advocacy on the basis of this pamphlet (or this pamphlet and similarly insufficient evidence) alone, and it is this circumstance that has resulted in an unconstitutional application of the membership clause in this case.[5]

---

[3]Pet. Br. No. 488 pp. 33-39; Pet. Suppl. Br. on Reargument No. 8 (Oct. Term 1959) pp. 39-46.

[4]The opinion does, to be sure, mention the Korean war documents in section IV (29 L. W. 4596-97), but only in the context of prejudice. There is no reference to the trial court's refusal to give the requested charge, nor to the constitutional implications of that refusal in terms of the membership clause.

[5]The fact that there may be other evidence of unlawful advocacy in the record (as the Court has found) is of course irrelevant, since the jury may have relied only on the evidence which was legally insufficient. This is what the prosecuting attorney invited the jury to do (R. A18-22, A24, G. Ex. 66; Pet. Br. No. 488 p. 35; Pet. Br. Rearg. pp. 44-45), and what the trial court refused to caution the jury against doing.

It is true that the Court's opinion further states (29 L. W. 4597) that "it is possible to infer from it [the Winnington pamphlet] that it was the purpose of the Party to undermine the Government in the eyes of the people in time of war as a preparatory measure, albeit legal in itself, to the teaching and sympathetic reception of illegal advocacy to violent revolution". This observation, however, at most supports the admissibility of this document as evidence of such preparation, but *not* as evidence of unlawful ("inciting") advocacy, which was in fact the purpose for which the Winnington pamphlet and the other Korean war documents were offered and used.[6]

In the same passage of its opinion (29 L. W. 4597), the Court drew exactly this distinction with respect to evidence of "teaching of the abstract theory of Marxism-Leninism", and declared that such evidence is admissible, but nevertheless insufficient to form the basis for conviction, so that "action-inciting" advocacy must be shown by other evidence if the conviction is to stand. For this very reason, it is essential that the jury be instructed concerning the type of evidence ("action-inciting") which is requisite, and the type of evidence which is insufficient ("abstract") to support a conviction. *Yates* v. *United States*, 354 U. S. 298. Only by such instructions is the jury enabled to distinguish between evidence which, if believed, is sufficient, and evidence which, even if believed, is insufficient, and is admissible merely as corroborative of or as giving support to the requisite evidence.

If such instructions are necessary to lay the basis for the jury's discrimination between "abstract" and "action-inciting" advocacy, they are at least equally necessary to inform the jury that lawful expressions of controversial opinion (such as the Korean war documents), even if admissible as "preparatory" or as corroborative, cannot in themselves

[6] R. A9, A11, A24; Tr. 1143; Govt. Br. No. 488, p. 118.

furnish the basis for a conviction, since they are not proof of unlawful advocacy. Indeed, such publications, abusive and repellent as they may be, are further removed from the unlawful advocacy punished by the Smith Act than is "abstract" advocacy of violent overthrow, for denunciation of government policy and practice is wholly unrelated to the subject of violent overthrow.

Petitioner submits, with all respect, that the Court has overlooked this basic point, which is plainly governed by *Grunewald* v. *United States*, 353 U. S. 391. There, as here (under the Court's finding in section III, 29 L. W. 4588-96), there was evidence on which the jury *could* have found the necessary circumstances to convict.[7] But the trial court did not sufficiently "enlighten the jury as to what they would have to find", and "left it open for the jury to convict" on the basis of evidence which failed to establish the requisite elements.[8]

Petitioner also suggests that the necessity for instructions discriminating between sufficient and insufficient evidence is especially compelling, as a matter of justice, in cases such as the present one. If documents or other utterances critical of the government are to be received as "preparatory" or corroborative evidence of sedition, the inevitable consequence is a sharp impingement on the guarantees of the First Amendment. If the utterances are intemperate and embody unpopular views, the danger of prejudice is very great. Assuming (as this Court decided, 29 L. W. 4596) that despite the prejudice, unquestionably awakened here by the Winnington pamphlet, the trial court did not abuse its discretion in receiving such evidence, that only underlines the grave need for instructing the jury that such evidence is insufficient to support a conviction.

---

[7] *I.e.* in the *Grunewald* case, concealment intended to achieve the purpose of the conspiracy, as distinguished from mere concealment of a completed conspiracy.

[8] 353 U. S. at 414-15; Pet. Br. Rearg. p. 45.

In the present case, the prosecution specifically invited the jury to find the unlawful action-inciting advocacy on the basis of the Winnington pamphlet (R. A24). The defense requested instructions (not mentioning particular evidence, but cast in general terms) to correct the error which the prosecution deliberately sought to implant in the jury's mind, and to enlighten the jury on the nature of the evidence requisite for conviction (R. A33-34). Under the principles enunciated in the *Gruneuald* and many other cases, and as a matter of simple and practical justice, the petitioner was entitled to such instructions, and their refusal has resulted in an unconstitutional application of the membership clause.

June 15, 1961.

Respectfully submitted,

TAYLOR, SCOLL, FERENCZ & SIMON
400 Madison Avenue
New York 17, New York

SMITH, MOORE, SMITH, SCHELL & HUNTER
Jefferson Standard Building
Greensboro, North Carolina

*Attorneys for Petitioner*

TELFORD TAYLOR,
MCNEILL SMITH,
*Of Counsel*

Telford Taylor, counsel for the petitioner herein, hereby certifies that this petition for rehearing is presented in good faith and not for delay.

TELFORD TAYLOR

June 15, 1961

# SUPREME COURT OF THE UNITED STATES

No. 1.—October Term, 1960.

Junius Irving Scales, Petitioner, v. United States of America. | On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[June 5, 1961.]

Mr. Justice Harlan delivered the opinion of the Court.

Our writ issued in this case (358 U. S. 917) to review a judgment of the Court of Appeals (260 F. 2d 21) affirming petitioner's conviction under the so-called membership clause of the Smith Act. 18 U. S. C. § 2385. The Act, among other things, makes a felony the acquisition or holding of knowing membership in any organization which advocates the overthrow of the Government of the United States by force or violence.[1] The indictment

[1] Section 2385 (whose membership clause we place in italics) reads:

"Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

"Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

"Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; *or becomes or is a member of*, or affiliates with, *any such society, group, or assembly of persons, knowing the purposes thereof*—

"Shall be fined not more than $20,000 or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the

charged that from January 1946 to the date of its filing (November 18, 1954) the Communist Party of the United States was such an organization, and that petitioner throughout that period was a member thereof, with knowledge of the Party's illegal purpose and a specific intent to accomplish overthrow "as speedily as circumstances would permit."

The validity of this conviction is challenged on statutory, constitutional, and evidentiary grounds, and further on the basis of certain alleged trial and procedural errors. We decide the issues raised upon the fullest consideration, the case having had an unusually long history in this Court.[2] For reasons given in this opinion we affirm the Court of Appeals.

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United States or any department or agency thereof, for the five years next following his conviction.

"If two or more persons conspire to commit any offense named in this section, each shall be fined not more than $20,000 or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction."

[2] Petitioner was first convicted before a jury in the Middle District of North Carolina in 1955. The conviction was upheld by the Court of Appeals, 227 F. 2d 581, and we granted certiorari at the 1955 Term, 350 U. S. 992. The case was first heard here at the 1956 Term, and was later set for reargument at the 1957 Term. Before reargument the judgment of conviction was reversed, upon the Solicitor General's concession that this Court's intervening decision in *Jencks* v. *United States*, 353 U. S. 657, in any event entitled Scales to a new trial. Scales was retried and again convicted in 1958. The Court of Appeals again affirmed, 260 F. 2d 21, and we again brought the case here. 358 U. S. 917. Argument on the present writ was first heard at the 1958 Term, the case being set for reargument at the following Term under an order in which the Court propounded certain questions to which counsel were requested particularly to address themselves. 360 U. S. 924. Before reargument was had, certiorari was granted (361 U. S. 951) in *Communist Party* v. *Subversive Activities Control Board* (No. 12, decided today, *ante*, p. ——), certain of the statutory and con-

## I.

### STATUTORY CHALLENGE.

Petitioner contends that the indictment fails to state an offense against the United States. The claim is that § 4 (f) of Internal Security Act of 1950, 64 Stat. 987, 50 U. S. C. § 781 *et seq.*, constitutes a *pro tanto* repeal of the membership clause of the Smith Act by excluding from the reach of that clause membership in any Communist organization. Section 4 (f) provides:

> "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 7 or section 8 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute.

To prevail in his contention petitioner must, of course, bring himself within the first sentence of this provision, since the second sentence manifestly refers only to exclusion from evidence of the fact of registration, thus assuming that a prosecution may take place.

We turn first to the provision itself, and find that, as to petitioner's construction of it, the language is at best ambiguous if not suggestive of a contrary conclusion. Section 4 (f) provides that membership or office-holding

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stitutional issues in which were closely related to some of those in the *Scales* case. Because of this interrelation of the two cases, the Court deemed it advisable that both should be heard and considered together, and accordingly put over this case for argument with the *Communist Party* case at the present Term.

in a Communist organization shall not constitute "per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute." Petitioner would most plainly be correct if the statute under which he was indicted purported to proscribe membership in Communist organizations, as such, and to punish membership *per se* in an organization engaging in proscribed advocacy. But the membership clause of the Smith Act on its face, much less as we construe it in this case, does not do this, for it neither proscribes membership in Communist organizations, as such, but only in organizations engaging in advocacy of violent overthrow, nor punishes membership in that kind of organization except as to one "knowing the purposes thereof," and, as we have interpreted the clause, with a specific intent to further those purposes (*infra*, p. —). We have also held that the proscribed membership must be active, and not nominal, passive or theoretical (*infra*, p. —). Thus the words of the first sentence of § 4 (f) by no means unequivocally demand the result for which petitioner argues. When we turn from those words to their context, both in the section as a whole and in the scheme of the Act of which they are a part, whatever ambiguity there may be must be resolved, in our view, against the petitioner's contention.

In the context of § 4 as a whole, the first sentence of subsection (f) does not appear to be a provision repealing in whole or in part any other provision of the Internal Security Act. Subsection (a) of § 4 makes it a crime

> "for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship . . . the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization or foreign individual . . . ."

Subsection (c) makes it a crime for any officer or member of a "Communist organization" to obtain classified information. We should hesitate long before holding that subsection (f) operates to repeal *pro tanto* either one of these provisions which are found in the same section of which subsection (f) is a part; and indeed the petitioner does not argue for any such quixotic result. The natural tendency of the first sentence of subsection (f) as to the criminal provisions specifically mentioned is to provide clarification of the meaning of those provisions, that is, that an offense is not made out on proof of *mere* membership in a Communist organization. As to these particularly mentioned criminal provisions immunity, such as there is, is specifically granted in the second sentence only, where it is said that the fact of registration shall not be admitted in evidence. Yet petitioner argues that when we come to the last phrase of the first sentence, the tag "or . . . any other criminal statute," the operative part of the sentence, "membership . . . shall [not] constitute per se a violation," has an altogether different purport and effect. What operated as a clarification and guide to construction to the specifically identified provisions is, petitioner argues, a partial repealer as to the statutes referred to in the omnibus clause at the end of the sentence.

It seems apparent from the foregoing that the language of § 4 (f) in its natural import and context should not be taken to immunize members of Communist organizations from the membership clause of the Smith Act, but rather as a mandate to the courts charged with the construction of subsections (a) and (c) "or . . . any other criminal statute" that neither those two named criminal provisions nor any other shall be *construed* so as to make "membership" in a Communist organization "per se a violation." Indeed, as we read the first sentence of § 4 (f), even if the membership clause of the Smith Act could be taken as punishing naked Communist Party membership, it would

then be our duty under § 4 (f) to construe it in accordance with that mandate, certainly not to strike it down. Although we think that the membership clause on its face goes beyond making mere Party membership a violation, in that it requires a showing both of illegal Party purposes and of a member's knowledge of such purposes, we regard the first sentence of § 4 (f) as a clear warrant for construing the clause as requiring not only knowing membership, but active and purposive membership, purposive that is as to the organization's criminal ends. (*Infra*, p. ——.) By its terms, then, subsection (f) does not effect a *pro tanto* repeal of the membership clause; at most it modifies it.

Petitioner argues that if the § 4 (f) provision does not bar this prosecution under the membership clause, then the phrase "or of any other criminal statute" becomes meaningless, for there is no other federal criminal statute that makes this sort of membership a crime. But the argument assumes the answer. The first sentence was intended to clarify, not repeal § 4 (a) of the Internal Security Act. By a parity of reasoning, its effect on "any other criminal statute" is also clarification, not repeal.

Petitioner's contentions do not stop, however, with the words of § 4 (f) itself. The supposed partial repeal of the membership clause by that provision, it is claimed, is a consequence of the latter's purpose in the whole scheme of the Internal Security Act of 1950, as illuminated by its legislative history. The argument runs as follows: The core of the Internal Security Act is its registration provisions (§§ 7 and 8), requiring disclosure of membership in the Communist Party following a valid final determination of the Subversive Activities Control Board as to the status of the Party. See No. ——, *ante*, p. ——. The registration requirement would be rendered nugatory by a plea of self-incrimination and could only be saved by a valid grant of immunity from prosecution by reason of any such

disclosure. However, the immunity provided by the second sentence of § 4 (f) is insufficient, in that it forbids only the use of the "fact of . . . registration" as evidence in any future prosecution, and not also its employment as a "lead" to other evidence. See *Counselman* v. *Hitchcock*, 142 U. S. 547; *Blau* v. *United States*, 340 U. S. 332. Therefore to effectuate the congressional purpose it becomes necessary to consider the first sentence of § 4 (f) a *pro tanto* repealer of the membership clause of the Smith Act, thereby assuring effective immunity from the criminal consequences of registration in this instance.

Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute. Certainly the section before us cannot be construed as petitioner argues. The fact of registration may provide a significant investigatory lead not only in prosecutions under the membership clause of the Smith Act, but equally probably to prosecutions under § 4 (a) of the Internal Security Act, let alone § 4 (c). Thus, if we accepted petitioner's argument that § 4 (f) must be read as a partial repealer of the membership clause, we would be led to the extraordinary conclusion that Congress also intended to immunize under § 4 (f) what it prohibited in these other subsections which it passed at the same time. Furthermore, the thrust of petitioner's argument cannot be limited to the membership clause, for it is equally applicable to any prosecution under any of a host of criminal provisions where Communist Party membership might provide an investigatory lead as to the elements of the crime.[3] We cannot attribute

[3] *E. g.*, 18 U. S. C. § 2385 (the remaining provisions of the Smith Act); 29 U. S. C. § 159 (h) repealed by the Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 519 § 201 (d) (non-Communist affidavits to be filed by union officers); or any of the offenses created by the Internal Security Act of 1950, for instance under §§ 4, 5 or 6.

any such sweeping purpose to Congress on the basis of the attenuated inference offered by petitioner.

Presented as we are with every indication in the statute itself that Congress had no purpose to bar a prosecution such as this, we turn to the legislative history of the Internal Security Act of 1950 to see if a different conclusion is indicated.

Section 4 (f) is the product of the fusion of provisions contained in measures conceived by the House and the Senate to deal with the problem which is the subject of the present Internal Security Act. Primarily, however, § 4 is the result of the Senate's efforts. In 1949 Senator Mundt reintroduced in the Senate a bill, the Mundt-Nixon bill, which had died in committee the year before. S. 2311, 81st Cong., 1st Sess. The bill, which was referred to the Committee on the Judiciary, contained registration provisions similar to those in the present statute, and a § 4 (a), a criminal provision identical to that of the present § 4 (a). In response to an enquiry, the Committee received a letter from an eminent lawyer, the late John W. Davis of New York, to the effect that although the primary purpose of the bill appears to be "ventilation rather than prohibition," there was a question whether "*mere membership* in a Communist political organization, which is . . . required to register [might] constitute an act such as section 4 (a) proscribes. If so," the letter continued, "is there not an inherent contradiction between these sections, and might not a person called on to register as a member claim that he would involuntarily incriminate himself by so doing?" S. Rep. No. 1358, pp. 43–44. Thus, the Davis letter seemed to address itself only to self-incrimination under the proscriptions of § 4 (a) and only to the extent that the membership disclosed by registration would without more constitute a violation of § 4 (a).

In response to this narrow objection the Committee drafted the predecessor of the present § 4 (f). That section, also numbered § 4 (f), provided that:

> "Neither the holding of office nor membership in any Communist organization by any person shall constitute a violation of subsection (a) . . . of this section. The fact of the registration of any person . . . shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) . . . ." S. 2311, as amended.

The Committee in reporting the bill out to the Senate made it abundantly clear that whatever objections might be made could, in its view, be overcome by the clarification of § 4 (a) contained in § 4 (f), to wit: that "*mere* membership in an organization required to register is not an overt act such as to bring a person within the prohibitions of section 4. This amendment was inserted to make clear the intent of Congress that registration . . . was not evidence of a violation of section 4 of the bill."[4] (Emphasis supplied.) S. Rep. No. 1358, p. 2. To the drafters of the original version of the section, then, the perforce limited immunity of the second sentence of § 4 (f) together with the clarification of the meaning of § 4 (a) in the first sentence was adequate to deal with the self-incrimination problem under § 4 (a), raised by the Davis letter. There is no mention of the Smith Act

[4] The report also stated: "Nowhere does the bill restrict or impair the constitutional privilege against self-incrimination under the fifth amendment, . . . As to whether any registration itself infringes upon the privilege of self-incrimination, . . . with respect to individual members, a person may be compelled to register, keep records, make reports or statements, etc., concerning any activity which the state properly may regulate, and he is not protected therefrom by the privilege . . . . This becomes purely academic, however, in the light of the specific bar to self-incrimination written into section 4 (f)."

or any other criminal statute as yet, but the problem of the necessary scope of immunity is no different in relation to § 4 (a) than it would be to such other statutes.

The subsequent history of the section in the Senate reinforces the conclusion that there was no intent to grant a broad immunity such as would meet the reasoning of *Counselman* v. *Hitchcock*. The Mundt-Nixon bill was incorporated in the body of an omnibus measure, the McCarran bill. S. 4037, 81st Cong., 2d Sess. When this bill was reported out to the Senate no further mention is made in the majority report of the Judiciary Committee of the sections under consideration. However, Senator Kilgore's minority report squarely presented two questions as to the insufficiency of the immunity provisions of § 4 (f): (1) that the immunity was inadequate to meet the *Counselman* rule, and (2) that in any case there was no immunity of any sort granted in respect of the Smith Act. S. Rep. No. 2369, Pt. 2, pp. 12–13. These grounds were urged against the bill also in debate by its opponents. Senator Humphrey read into the Record a "brief" prepared by the Justice Department which in effect restated the objections of the minority report. 96 Cong. Rec. 14475, at 14479. Senator Lehman stated the same objections, and also suggested that the membership clause of the Smith Act as well as § 4 (a) made Communist membership *per se* a crime. This latter contention was vigorously denied by the proponents of the measure.[5] Thus, the Senate passed

[5] Senator Lehman, arguing that the bill required self-incrimination stated:

"We already have on the statute books more than 20 laws to control and penalize subversive activities. . . . We also have the Smith Act, recently upheld by the Court of Appeals, which makes membership in the Communist Party prima facie evidence of criminal intent. . . .

". . . [R]egistration would constitute self-incrimination, if not

its predecessor version of § 4 (f), even though it had had clearly presented to it constitutional objections to that provision which are the same as the objections petitioner now makes to a natural and literal reading of the present statute. There was no immunity of any kind against Smith Act prosecutions, and only limited immunity against prosecutions under the comparable provisions of § 4 (a).

The history of the original House measure is likewise relevant to the issue under consideration. That measure, the Wood bill, which also provided for registration, contained no provision similar to § 4 (a), but did have a provision similar to the present § 4 (c), forbidding members of Communist organizations from obtaining classified

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under the terms of this law, then under the terms of the Smith Act." 96 Cong. Rec. 14190.

As the debate continued, Senator Long said:

"I was under the impression from hearing the Senator from New York yesterday, that he said that under a previous statute it was unlawful to belong to an organization that advocated the overthrow of the United States government by force . . . that there was a previous act which made it unlawful for one to be a member of [such] an organization. . . .

"Senator Ferguson: Is is not true that Judge Medina, in his charge to the jury in the trial of the 11 Communists, told them that mere membership in the Communist Party was not sufficient to warrant the jury in convicting them under the Smith Act? [The petitioner in the present case correctly notes that this reference was to the *Dennis* case involving an indictment for conspiracy to advocate, not the membership clause of the Smith Act.]

"Mr. Mundt [who was one of the proponents of the original bill]: Precisely.

"Mr. Ferguson: So that it could not apply to that law.

"Mr. Mundt: It could not conceivably apply. . . . [I]t would be an incorrect interpretation of the [Smith] Act. . . ." 96 Cong. Rec. 14235.

Senator McCarran, whose name the new omnibus Senate measure bore, stated in connection with the Smith Act:

"It was arresting to hear the Senator from New York declare on

information. H. R. 9490, 81st Cong., 2d Sess. The bill included an immunity provision in the same subsection as the predecessor to present § 4 (c), which declared that:

> ". . . the fact of the registration of any person . . . shall not be received in evidence against such person in any prosecution for any alleged violation . . . of this section."

Once again, the Wood bill demonstrates the same narrow view of the self-incrimination problem as was evidenced by the Senate bill. In debate Congressmen Celler and Marcantonio, opposing the bill, pointed to the two-fold inadequacy of the immunity provision: its failure to meet *Counselman*, and its not reaching other criminal statutes. 96 Cong. Rec. 13739–13740. The House responded to these objections by adding the words "or any other . . . criminal statute" at the end of the above quoted provision. 96 Cong. Rec. 13761. It is, therefore, even clearer than in the case of the Senate's action that there was no attempt to grant complete immunity or to repeal any other statute at least as to prosecution of Communist Party members, since the House's immunity provision in

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Tuesday that 'the Smith Act . . . makes membership in the Communist Party prima facie evidence of criminal intent.' . . .

". . . [O]f course, the statement about the Smith Act making membership in the Communist Party prima facie evidence of criminal intent simply has no foundation in fact. . . .

". . . Of course, in order to make a statement like the one he made a man must not have read Judge Medina's scholarly charge to the jury, in which he specifically points out that the Communist membership or affiliation of the 11 defendants was not . . . a part of the charged offense . . . .

"Mr. President, subsection 4 (f) provides as follows: 'neither the holding of office nor membership . . . shall constitute a violation of subsection (a) . . . .'

". . . I hope the Senator from New York finds time to read [the section as a whole], and then I hope he may see fit to tell the Senate whether he still thinks Communists, *as such*, would obviously be indictable and subject to imprisonment under section 4 (a)." 96 Cong. Rec. 1442–1443. (Emphasis supplied.)

terms only dealt with the admission into evidence of the fact of registration, having no provision comparable to the first sentence of present § 4 (f). That there was no such provision may perhaps be explained by the fact that there was no equivalent to § 4 (a) in need of clarification.

In conference, the substance of the Senate bill was accepted by the conferees, including the criminal provision of the present § 4 (a). The Senate version of § 4 (f) was amended to its present form by the addition of the House "or any other criminal statute" language to both the first and second sentence of the subsection, and by the addition of "per se" to the first sentence. Thus we are asked by petitioner to hold that although neither House in its preconference bills evidenced any purpose to repeal the Smith Act insofar as Communist Party membership was concerned, let alone other possibly applicable statutes under which registration as a Party member might produce an investigatory lead (see note 3, *supra*), the amalgamation of these two bills was intended, though without any notification by the Conferees to either House in their Conference reports, to have this result. Nor does the addition of the words "per se" advance petitioner's argument. On its face the addition would seem simply to make more explicit the clarificatory purpose of the sentence. In its context of worries that § 4 (a) or the Smith Act makes Communist membership *per se* criminal, and of statements by the proponents of the bills that this was an unfounded fear as to both provisions, the purely clarificatory purpose of *per se* is apparent. Furthermore, we are asked to attribute this purpose to the conferees, although neither they nor the proponents of the measure as it finally emerged from conference said a word about such an important departure from the original purposes of the two Houses.[6]

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[6] Perhaps the closest we come to any suggestion that § 4 (f) repeals, *pro tanto*, the Smith Act is the statement by Representative Multer

Finally, it is worth noting that after the conference measure returned to the floor of the Senate it was attacked by Senator Kefauver on precisely the same grounds as had been urged against it in both Houses prior to conference: that the immunity conferred by the present § 4 (f) was too narrowly drawn to save the registration provisions against an attack under *Counselman*. 96 Cong. Rec. 15198–15199. This same attack was renewed after the President's veto, which was overridden by Congress.[7] 96 Cong. Rec. 15553–15554.

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of New York, an opponent of the measure, during the debate on the final version of the bill: "Another very bad provision in this bill is the new—to this House—first sentence of [§ 4 (f)]. . . .

"I venture to predict that if this bill becomes law you not only vitiate one of the most important parts of the Smith law, but you will give a new argument and defense to the 11 Communists recently convicted in the Federal court in New York of crimes against the United States, as proscribed in the Smith law," 96 Cong. Rec. 15289, or a similar argument against the bill by Senator Kilgore, 96 Cong. Rec. 15192.

[7] Petitioner makes reference to the legislative history of an amendment to the Communist Control Act of 1954, S. 3706, 83d Cong., 2d Sess., introduced and passed with modifications in a hurried and confused debate in both Houses. The amendment, proposed by Senator Humphrey, provided that it would be criminal knowingly and wilfully to become or remain a member of the Communist Party, or any other organization whose purpose is to overthrow the government by force and violence. The amendment was opposed by the proponents of the Internal Security Act of 1950, among others, on the grounds that it would impair the effectiveness of § 4 (f) of the 1950 Act, possibly rendering the registration provisions of that Act unconstitutional. But it seems clear that this result was conceived to flow from the fact that the amendment mentioned the Communist Party by name, thus making registration tantamount to an admission of the crime itself. As Representative Halleck, the then majority leader who opposed the amendment, put it:

"... [W]e have the Internal Security Act of 1950, which was worked out after the most careful consideration . . . and the Smith Act, under which we have had more than 100 indictments and sixty-

The legislative history of § 4 (f), therefore, far from weakening the conclusion flowing from analysis of the terms of the statute itself, fortifies that analysis at every point. To conclude that Congress' desire to protect the registration provisions of the Internal Security Act against pleas of self-incrimination should prevail over its advertent failure to assure that result at the expense of wiping out the membership clause of the Smith Act, as applied to Communists, would require a disregard by this Court of the evident congressional purpose. Whatever may be the consequences of that failure upon the Internal Security Act we are concerned here solely with the question whether Congress by § 4 (f) intended a partial repeal of the membership clause of the Smith Act. We conclude that it did not and hold that this prosecution is not barred by § 4 (f) of the Internal Security Act of 1950.

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some convictions, all of Communist leaders . . . . Those acts we have on the books . . . they have established themselves.

". . . [T]he Attorney-General . . . speaking of the Internal Security Act . . . said: 'Essential to the validity of this careful plan, however, is the provision of section 4 (f) of the act . . . . It is apparent that the enactment of legislation making membership in the Communist Party per se a crime would be in direct conflict with these provisions of the Internal Security Act. If membership alone is made criminal, to require him to declare his membership is to require him to give self-incriminating evidence. By nullifying this portion of the act, its entire operation would be jeopardized. . . .

"In other words, what we are doing permits outlawing the Communist Party, and maintaining the Internal Security Act, and all other acts by which we deal realistically with the Communist conspiracy." 100 Cong. Rec. 14658.

There is no doubt that the Humphrey amendment is in many respects similar to the membership clause. But it was assumed by many of the proponents of the 1950 Act, perhaps illogically and under a misapprehension as to the law, that the amendment should be defeated to preserve the integrity of the 1950 Act and the Smith Act. Certainly it was considered by no one that the membership clause had been repealed, or its application to Communists barred by § 4 (f) of the 1950 Act.

## II.

### Constitutional Challenge to the Membership Clause on its Face.

Petitioner's constitutional attack goes both to the statute on its face and as applied. At this point we deal with the first aspect of the challenge and with one part of its second aspect. The balance of the latter, which essentially concerns the sufficiency of the evidence, is discussed in the next section of this opinion.

It will bring the constitutional issues into clearer focus to notice first the premises on which the case was submitted to the jury. The jury was instructed that in order to convict it must find that within the three-year limitations period[8] (1) the Communist Party advocated the violent overthrow of the Government, in the sense of present "advocacy of action" to accomplish that end as soon as circumstances were propitious, and (2) petitioner was an "active" member of the Party, and not merely "a nominal, passive, inactive or purely technical" member, with knowledge of the Party's illegal advocacy and a specific intent to bring about violent overthrow "as speedily as circumstances would permit."

The constitutional attack upon the membership clause, as thus construed, is that the statute offends (1) the Fifth Amendment,[9] in that it impermissibly imputes guilt to an individual merely on the basis of his associations and sympathies, rather than because of some concrete personal involvement in criminal conduct; and (2) the First Amendment,[10] in that it infringes free political expression

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[8] November 18, 1951 to November 18, 1954. See 18 U. S. C. § 3282.

[9] "No person shall ... be deprived of life, liberty or property, without due process of law ...."

[10] "Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

and association. Subsidiarily, it is argued that the statute cannot be interpreted as including a requirement of a specific intent to accomplish violent overthrow, or as requiring that membership in a proscribed organization must be "active" membership, in the absence of both or either of which it is said the statute becomes *a fortiori* unconstitutional.[11] It is further contended that even if the adjective "active" may properly be implied as a qualification upon the term "member," petitioner's conviction would nonetheless be unconstitutional, because so construed the statute would be impermissibly vague under the Fifth and Sixth Amendments,[12] and so applied would in any event infringe the Sixth Amendment, in that the indictment charged only that Scales was a "member," not an "active" member, of the Communist Party.

1. *Statutory Construction.*

Before reaching petitioner's constitutional claims, we should first ascertain whether the membership clause permissibly bears the construction put upon it below. We think it does.

The trial court's definition of the kind of organizational advocacy that is proscribed was fully in accord with what was held in *Yates* v. *United States*, 354 U. S. 298.[13] And the statute itself requires that a defendant must have knowledge of the organization's illegal advocacy.

The only two elements of the crime, as defined below, about which there is controversy are therefore "specific intent" and "active" membership. As to the former, this Court held in *Dennis* v. *United States*, 341 U. S. 494,

[11] While the Government undertakes to defend the statute in the absence of either or both such elements, its ultimate constitutional position rests on the presence of both.

[12] "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . ."

[13] See note 30, *infra*.

499–500, that even though the "advocacy" and "organizing" provisions of the Smith Act, unlike the "literature" section (note 1, *supra*), did not expressly contain such a specific intent element, such a requirement was fairly to be implied. We think that the reasoning of *Dennis* applies equally to the membership clause, and are left unpersuaded by the distictions petitioner seeks to draw between this clause and the advocacy and organizing provisions of the Smith Act.

We find hardly greater difficulty in interpreting the membership clause to reach only "active" members. We decline to attribute to Congress a purpose to punish nominal membership, even though accompanied by "knowledge" and "intent," not merely because of the close constitutional questions that such a purpose would raise (cf. *infra*, p. —, cf. *Yates*, *supra*, at 319), but also for two other reasons: It is not to be lightly inferred that Congress intended to visit upon mere passive members the heavy penalties imposed by the Smith Act.[14] Nor can we assume that it was Congress' purpose to allow the quality of the punishable membership to be measured solely by the varying standards of that relationship as subjectively viewed by different organizations. It is more reasonable to believe that Congress contemplated an objective standard fixed by the law itself, thereby assuring an even-handed application of the statute.

This Court in passing on a similar provision requiring the deportation of aliens who have become members of the Communist Party—a provision which rested on Congress' far more plenary power over aliens, and hence did not press nearly so closely on the limits of constitutionality

[14] The statute allows a fine of not more than $10,000 and a sentence of not more than ten years to be imposed, and makes one convicted under the statute ineligible for employment by the United States or any department or agency thereof for five years following conviction. Petitioner was sentenced to imprisonment for six years.

as this enactment—had no difficulty in interpreting "membership" there as meaning more than the mere voluntary listing of a person's name on Party rolls. *Galvan* v. *Press*, 347 U. S. 522; *Rowoldt* v. *Perfetto*, 355 U. S. 115; see *Bridges* v. *Wixon*, 326 U. S. 135. A similar construction is called for here.[15]

Petitioner's particular constitutional objections to this construction are misconceived. The indictment was not defective in failing to charge that Scales was an "active" member of the Party, for that factor was not in itself a discrete element of the crime, but an inherent quality of the membership element. As such it was a matter not for the indictment, but for elucidating instructions to the jury on what the term "member" in the statute meant. Nor do we think that the objection on the score of vagueness is a tenable one. The distinction between "active" and "nominal" membership is well understood in common parlance (cf. *Boyce Motor Lines* v. *United States*, 342 U. S. 337; *United States* v. *Petrillo*, 332 U. S. 1; *Sproles* v. *Binford*, 286 U. S. 374), and the point at which one shades into the other is something that goes not to the sufficiency of the statute, but to the adequacy of the trial court's guidance to the jury by way of instructions in a particular case. See *infra*, p. ——. Moreover, whatever abstract doubts might exist on the matter, this case presents no such problem. For petitioner's actions on behalf of the Communist Party most certainly amounted to active membership by whatever standards one could reasonably anticipate, and he can therefore hardly be considered to have acted unadvisedly on this score.

We find no substance in the further suggestion that petitioner could not be expected to anticipate a construc-

[15] The element of "activity" in the proscribed membership stands apart from the ingredient of guilty "knowledge" in that the former may be shown by a defendant's participation in general Party affairs, whereas the latter requires linking him with the organization's illegal activities.

tion of the statute that included within its elements activity and specific intent, and hence that he was not duly warned of what the statute made criminal. It is, of course, clear that the lower courts' construction was narrower, not broader, than the one for which petitioner argues in defining the character of the forbidden conduct and that therefore, according to petitioner's own construction, his actions were forbidden by the statute. The contention must then be that petitioner had a right to rely on the statute, as *he* construed it, being held unconstitutional. Assuming, *arguendo*, that petitioner's construction was not unreasonable, no more can be said than that—in light of the courts' traditional avoidance of constructions of dubious constitutionality and in light of their role in construing the purpose of a statute—there were two ways one could reasonably anticipate this statute being construed, and that petitioner had clear warning that his actions were in violation of both constructions. There is no additional constitutional requirement that petitioner should be entitled to rely upon the statute being construed in such a way as possibly to render it unconstitutional. In sum, this argument of a "right" to a literal construction simply boils down to a claim that the view of the statute taken below did violence to the Congressional purpose. Of course a litigant is always prejudiced when a court errs, but whether or not the lower courts erred in their construction is an issue which can only be met on its merits, and not by reference to a "right" to a particular interpretation.

We hold that the statute was correctly intepreted by the two lower courts, and now turn to petitioner's basic constitutional challenge.

2. *Fifth Amendment.*

In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that

status or conduct to other concededly criminal activity (here advocacy of violent overthrow), that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment. Membership, without more, in an organization engaged in illegal advocacy, it is now said, has not heretofore been recognized by this Court to be such a relationship.[16] This claim stands, and we shall examine it, independently of that made under the First Amendment.

Any thought that due process puts beyond the reach of the criminal law all individual associational relationships, unless accompanied by the commission of specific acts of criminality, is dispelled by familiar concepts of the law of conspiracy and complicity. While both are commonplace in the landscape of the criminal law, they are not natural features. Rather they are particular legal concepts manifesting the more general principle that society, having the power to punish dangerous behavior, cannot be powerless against those who work to bring about that behavior.[17]

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[16] But compare *Whitney* v. *California*, 274 U. S. 357; *Burns* v. *United States*, 274 U. S. 328, sustaining state convictions under the organizing and membership provisions of the California Criminal Syndicalism Act.

[17] Complicity has been defined thus: "A person is an accomplice of another person in commission of a crime if:

"(a) with the purpose of promoting or facilitating the commission of the crime, he

"(1) commanded, requested, encouraged for provoked such other person to commit it; or

"(2) aided, agreed to aid or attempted to aid such other person in planning or committing it; . . .

"(b) acting with knowledge that such other person was committing or had the purpose of committing the crime, he knowingly, substantially facilitated its commission; . . . ." American Law Institute, Model Penal Code § 2.04 (3), tentative draft No. 1 (1953). The formulation restates the statutory provisions generally found in juris-

The fact that Congress has not resorted to either of these familiar concepts means only that the enquiry here must direct itself to an analysis of the relationship between the fact of membership and the underlying substantive illegal conduct, in order to determine whether that relationship is indeed too tenuous to permit its use as the basis of criminal liability. In this instance it is an organization which engages in criminal activity,[18] and we can

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dictions in the United States. See, *e. g.*, 18 U. S. C. § 2 (a); Ariz. Code Ann., 1939, § 43–116; Vernon's Texas Stat., 1952, Pen. Code, Art. 70; cf. Criminal Code of Canada, Tremeears, 1944, § 69. It should be noted that the membership clause as here construed is more limited than subsection (b) of this provision, since it is not enough that one has knowingly facilitated the substantive criminal conduct, but there must also be present the specific purpose of facilitating it.

There is, of course, considerable overlap between the law of complicity and the law of conspiracy, and genuine problems arise as to whether a conspirator is, by reason of his conspiracy, to be considered an accomplice and therefore guilty also of the substantive offense. See ALI, Model Penal Code, tentative draft No. 1 (1953), at pp. 20–33; Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 922, 993–1000 (1959). But we are solely concerned here with pointing up the accepted limits of imputation of guilt, not with exploring the problems created by the various provisions by which such imputation is effected.

[18] The problems in attributing criminal behavior to an abstract entity rather than to specified individuals, though perhaps difficult theoretically, as a practical matter resolve themselves into problems of proof. Whether it has been successfully shown that a particular group engages in forbidden advocacy must depend on the nature of the organization, the occasions on which such advocacy took place, the frequency of such occasions, and the position within the group of the persons engaging in the advocacy. (See pp. —, *infra*.) Understood in this way, there is no great difference between a charge of being a member in a group which engages in criminal conduct and being a member of a large conspiracy, many of whose participants are unknown or not before the court. Whatever difficulties might be thought to inhere in ascribing a course of criminal conduct to an abstract entity, are certainly cured, so far as any particular defendant

perceive no reason why one who actively and knowingly works in the ranks of that organization, intending to contribute to the success of those specifically illegally activities, should be any more immune from prosecution than he to whom the organization has assigned the task of carrying out the substantive criminal act. Nor should the fact that Congress has focussed here on "membership," the characteristic relationship between an individual and the type of conspiratorial quasi-political associations with the criminal aspect of whose activities Congress was concerned, of itself require the conclusion that the legislature has traveled outside the familiar and permissible bounds of criminal imputability. In truth, the specificity of the proscribed relationship is not necessarily a vice; it provides instruction and warning.[19]

What must be met, then, is the argument that membership, even when accompanied by the elements of knowledge and specific intent, affords an insufficient quantum of participation in the organization's alleged criminal activity, that is, an insufficiently significant form of aid and encouragement to permit the imposition of criminal sanctions on that basis. It must indeed be recognized that a person who merely becomes a member of an illegal organization, by that "act" alone need be doing nothing more than signifying his assent to its purposes and activities on one hand, and providing, on the other, only the sort of moral encouragement which comes from the knowledge that others believe in what the organization is doing. It may indeed be argued that such assent and encouragement do fall short of the concrete, practical impetus given to a criminal enterprise which is lent for instance by a

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is concerned, by the requirement of proof that he knew that the *organization* engages in criminal advocacy, and that it was his purpose to further that criminal advocacy.

[19] See generally Hart, The Aims of the Criminal Law, 23 Law & Contemp. Prob. 401 (1958).

commitment on the part of a conspirator to act in furtherance of that enterprise. A member, as distinguished from a conspirator, may indicate his approval of a criminal enterprise by the very fact of his membership without thereby necessarily committing himself to further it by any act or course of conduct whatever.

In an area of the criminal law which this Court has indicated more than once demands its watchful scrutiny (see *Dennis, supra,* at 516; *Yates, supra; infra,* 328; and see also *Noto* v. *United States,* decided today, No. —, *post*), these factors have weight [20] and must be found to be overborne in a total constitutional assessment of the statute. We think, however, they are duly met when the statute is found to reach only "active" members having also a guilty knowledge and intent, and which therefore prevents a conviction on what otherwise might be regarded as merely an expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action.

Thus, given the construction of the membership clause already discussed, we think the factors called for in rendering members criminally responsible for the illegal advocacy of the organization fall within established, and therefore presumably constitutional standards of criminal imputability.

### 3. *First Amendment.*

Little remains to be said concerning the claim that the statute infringes First Amendment freedoms. It was settled in *Dennis* that the advocacy with which we are here concerned is not constitutionally protected speech, and it was further established that a combination to pro-

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[20] Compare concurring opinion of Mr. Justice Brandeis in *Whitney* v. *California,* 274 U. S. 357, 372, 373.

mote such advocacy, albeit under the aegis of what purports to be a political party, is not such association as is protected by the First Amendment. We can discern no reason why membership, when it constitutes a purposeful form of complicity in a group engaging in this same forbidden advocacy, should receive any greater degree of protection from the guarantees of that Amendment.

If it is said that the mere existence of such an enactment tends to inhibit the exercise of constitutionally protected rights, in that it engenders an unhealthy fear that one may find himself unwittingly embroiled in criminal liability, the answer surely is that the statute provides that a defendant must be proven to have knowledge of the proscribed advocacy before he may be convicted. It is, of course, true that quasi political parties or other groups that may embrace both legal and illegal aims differ from a technical conspiracy, which is defined by its criminal purpose, so that *all* knowing association with the conspiracy is a proper subject for criminal proscription as far as First Amendment liberties are concerned. If there were a similar blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired, but the membership clause, as here construed, does not cut deeper into the freedom of association than is necessary to deal with "the substantive evils that Congress has a right to prevent." *Schenk* v. *United States*, 249 U. S. 47, 52. The clause does not make criminal all association with an organization, which has been shown to engage in illegal advocacy. There must be clear proof that a defendant "specifically intend[s] to accomplish [the aims of the organization] by resort to violence." *Noto* v. *United States*, *post*, p. —. Thus the member for whom the organization is a vehicle for the advancement of legitimate aims and policies does not fall within the ban of the statute: he

lacks the requisite specific intent "to bring about the overthrow of the government as speedily as circumstances would permit." Such a person may be foolish, deluded, or perhaps merely optimistic, but he is not by this statute made a criminal.

We conclude that petitioner's constitutional challenge must be overruled.[21]

## III.

### Evidentiary Challenge.

Only in rare instances will this Court review the general sufficiency of the evidence to support a criminal conviction, for ordinarily that is a function which properly belongs to and ends with the Court of Appeals. We do so in this case and in No. 9, *post*, p. —, *Noto* v. *United States*, —, —, our first review of convictions under the membership clause of the Smith Act—not only to make sure that substantive constitutional standards have not been thwarted, but also to provide guidance for the future to the lower courts in an area which borders so closely upon constitutionally protected rights.

On this phase of the case petitioner's principal contention is that the evidence was insufficient to establish that the Communist Party was engaged in present advocacy of violent overthrow of the Government in the sense required by the Smith Act, that is, in "advocacy of action" for the accomplishment of such overthrow either immediately or as soon as circumstances proved propitious, and uttered in terms reasonably calculated to "incite" to such action. See *Yates* v. *United States*, *supra*, 318–322. This contention rests largely on the proposition that the

[21] As both sides appear to agree that the "clear and present danger" doctrine, as viewed and applied in *Dennis*, *supra*, at —, also reaches the membership clause of the Smith Act, and since the petition for certiorari tenders no issue as to the method of applying it here, we do not consider either question.

evidence on this aspect of the case does not differ materially from that which the Court in *Yates* stated was inadequate to establish that sort of Party advocacy there.

In *Yates* the Government sought to use the Communist Party, or at least the California branch of the Party, as the conspiratorial nexus between various individuals charged, among other things, with a conspiracy to engage in illegal advocacy. Upon reversal here for error in the trial court's charge on the nature of the advocacy proscribed by the Smith Act, this Court, in the exercise of its powers under 28 U. S. C. § 2106,[22] went on to consider the adequacy of the evidence for the purpose of determining as to which defendants an acquittal should be ordered, and as to which ones the way for a new trial should be left open. In the process it was stated that the Government's Party conspiratorial-nexus theory was unavailing because the evidence fell short of establishing that the Party's advocacy constituted "a call to forcible action" for the accomplishment of immediate or future overthrow, in contrast to the teaching of mere "abstract doctrine" favoring that end. 354 U. S., at 329. At the same time, however, it was found that the record reflected certain episodes which, it was considered, might permissibly lend themselves to an inference of illegal advocacy by particular Party members (see *id.*, at 331–333). It was concluded, however that these and similar episodes were too "sporadic" and remote (*id.*, 330) to justify their attribution to the Party, possibly casting its abstract teaching of the "Communist classics" in a different mold. Accordingly, the Court directed an acquittal of those defendants who had not themselves been connected with such episodes.

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[22] That statute gives the Court power upon review to "direct the entry of such appropriate judgment . . . as may be just under the circumstances."

We agree with petitioner that the evidentiary question here is controlled in large part by *Yates*. The decision in *Yates* rested on the view (not articulated in the opinion, though perhaps it should have been) that the Smith Act offenses, involving as they do subtler elements than are present in most other crimes, call for strict standards in assessing the adequacy of the proof needed to make out a case of illegal advocacy. This premise is as applicable to prosecutions under the membership clause of the Smith Act, as it is conspiracy prosecutions under that statute as we had in *Yates*.

The impact of *Yates* with respect to this petitioner's evidentiary challenge is not limited, however, to that decision's requirement of strict standards of proof. *Yates* also articulates general criteria for the evaluation of evidence in determining whether this requirement is met. The *Yates* opinion, through its characterizations of large portions of the evidence which were either described in detail or referred to by reference to the record, indicates what type of evidence is needed to permit a jury to find that (a) there was "advocacy of action" and (b) the Party was responsible for such advocacy.

First, *Yates* makes clear what type of evidence is not *in itself* sufficient to show illegal advocacy. This category includes evidence of the following: the teaching of Marxism-Leninism and the connected use of Marxist "classics" as textbooks; the official general resolutions and pronouncements of the Party at past conventions; dissemination of the Party's general literature, including the standard outlines on Marxism; the Party's history and organizational structure; the secrecy of meetings and the clandestine nature of the Party generally; statements by officials evidencing sympathy for and alliance with the the U. S. S. R. It was the predominance of evidence of this type which led the Court to order the acquittal of several *Yates* defendants, with the comment that they had not themselves "made a single remark or been present

when someone else made a remark which would tend to prove the charges against them." However, this kind of evidence, while insufficient in itself to sustain a conviction, is not irrelevant. Such evidence, in the context of other evidence, may be of value in showing illegal advocacy.

Second, the *Yates* opinion also indicates what kind of evidence is sufficient. There the Court pointed to two series of events which justified the denial of directed acquittals as to nine of the *Yates* defendants. The Court noted that with respect to seven of the defendants, meetings in San Francisco which were described by the witness Foard might be considered to be "the systematic teaching and advocacy of illegal action which is condemned by the statute." 354 U. S., at 331. In those meetings, a small group of members were not only taught that violent revolution was inevitable, but they were also taught techniques for achieving that end. For example, the *Yates* record reveals that members were directed to be prepared to convert a general strike into a revolution and deal with Negroes so as to prepare them specifically for revolution. In addition to the San Francisco meetings, the Court referred to certain activities in the Los Angeles area "which might be considered to amount to 'advocacy of action'" and with which two *Yates* defendants were linked. *Id.*, 331–332. Here again, the participants did not stop with teaching of the inevitability of eventual revolution, but went on to explain techniques, both legal and illegal, to be employed in preparation for or in connection with the revolution. Thus, one member was "surreptitiously indoctrinated in methods . . . .of moving 'masses of people in time of crisis'"; others were told to adopt such Russian prerevolutionary techniques as the development of a special communication system through a newspaper similar to Pravda. *Id.*, 332. Viewed together, these events described in *Yates* indicate at least two patterns of evidence sufficient to show illegal advo-

cacy: (a) the teaching of forceful overthrow, accompanied by directions as to the type of illegal action which must be taken when the time for the revolution is reached; and (b) the teaching of forceful overthrow, accompanied by a contemporary, though legal, course of conduct clearly undertaken for the specific purpose of rendering effective the later illegal activity, which is advocated. Compare *Noto* v. *United States*, *infra*, at —.

Finally, *Yates* is also relevant here in indicating, at least by implication, the type and quantum of evidence necessary to attach liability for illegal advocacy to the Party. In discussing the Government's "conspiratorial-nexus theory" the Court found that the evidence there was insufficient because the incidents of illegal advocacy were infrequent, sporadic, and not fairly related to the period covered by the indictment. In addition, the Court indicated that the illegal advocacy was not sufficiently tied to officials who spoke for the Party as such.

Thus, in short, *Yates* imposes a strict standard of proof, and indicates the kind of evidence that is insufficient to show illegal advocacy under that standard, the kind of evidence that is sufficient, and what pattern of evidence is necessary to hold the Party responsible for such advocacy. With these criteria in mind, we now proceed to an examination of the evidence in this case.

We begin with what was also present in *Yates*, the general evidence as to the doctrines, organization, and tactical procedures of the Communist Party, exposited by Lautner, the Government's foundational witness both here and in *Yates*. Together with documentary evidence, Lautner's testimony, based on high-level participation in Party affairs from 1929 to 1950, furnished the necessary background in Party theory and terminology which is crucial to the proper appreciation of the tenor of Party pronouncements, for these pronouncements, taken out

of this larger context might appear harmless and peaceable without in reality being so. The distinction that was drawn in *Yates* between theoretical advocacy and advocacy of violence as a rule of action is of course basic, but when the teaching is carried out in a special vocabulary, knowledge of that vocabulary is at least relevant to an understanding of the quality and tenor of the teaching.

Lautner's testimony, having covered the pre-war history of the Party passed to the 1945 reconstitution of the organization. Prior to that time the Party, as the Communist Political Association, had adhered to the position that the change to a Communist society could be achieved through peaceful, democratic, means. The reconstitution, which was finally approved at a National Convention in July of 1945, involved a return to the principles of Marxism-Leninism. As found in the so-called Communist classics, the adoption of a program of industrial concentration, the increased effort among Negroes, especially in the South, the complete repudiation of the former Party leader, Browder, and his doctrine of "revisionism," all signified, so Lautner testified, that the United States was henceforth to be regarded as no exception to the teachings of Lenin that communism could only be achieved in an industrialized nation such as this by resort to violent revolution, and that a belief in peaceful means was foolishness or treachery. Lautner testified that the industrial concentration program, as well as the emphasis on the Negro minority, was an articulation of this doctrine, in that it involved a concentration on those elements in society which the Party believed could do most damage, in time of crisis, to the existing social fabric in relation to their numbers, and that victory at the polls was not its concern. Lautner testified that it was further resolved at the 1945 National Convention that in order to implement the principles of the reconstitution, a program of thorough re-education of the whole Party membership

should be undertaken, and Lautner himself was charged with the duty of carrying out this re-education as a District Organizer and State Chairman. The balance of Lautner's testimony was devoted to a detailed description of the elaborate underground "apparatus" which he and others were charged with setting up in the various portions of the country assigned to them.

Mrs. Hartle testified as to her activities in the Party, primarily in the Pacific Northwest area, from 1934 to approximately 1952. Mrs. Hartle confirmed, in many respects, Lautner's testimony as to Party teaching and doctrine throughout this period. After the 1945 reconstitution she was sent to the National Training School in New York, where thirty "officers and functionaries" from various parts of the country were "re-educated" in accordance with the decisions and resolutions of the 1945 Convention. She was taught about "dialectical materialism," and the theory of struggle between the capitalist class and the working class. They were taught "and reference was made to a quotation . . . that it is the duty of a revolutionary not to try to gloss over this class struggle or to try to compromise it, but to unravel it, to allow this class struggle and help this class struggle to unfold, the clash to proceed." The class was told that "it is the duty of a Marxist-Leninist to be a revolutionary and not a reformist." They were further instructed "that the United States . . . was objectively at the stage for Proletarian revolution," that the time for the proletariat revolution would come when the objective conditions of political or economic crisis coincided with the "subjective condition" of a Communist Party which was large enough, with enough "influence" among the working classes, "to give the necessary leadership to lead to the seizure of power."

Much of the testimony summarized so far may indeed be considered to relate to the mere theory of revo-

lution, abstract advocacy. However, the teaching at the National Training School also descended to a lower level of generality. Mrs. Hartle was told that the "role" of the Communist Party was "preparing the workers and the people to be ready to be able to take power, to know how to take power" when a "revolutionary situation arose." At that time, "the plan and program of the Party would be to lead the working class to seize power" and "to smash the Bourgeois state machine." With respect to this latter task, the class was told:

> ". . . the Bourgeois state machine is not smashed after the seizure of power, but in the course of seizing power that the armies, the police, the prisons have to be dealt with and smashed up and rendered inoperative in the course of the seizure of power, that other matters, that some other matters in replacing the, a state, such as the, some of the administrative apparatus and some other matters would take a longer period of time, but the forcible elements of the capitalist state must be smashed in the course of taking power, but some other things like reorganizing the banking system, or some matters like that, could be done in a somewhat longer process."

In pressing toward the fulfillment of the "subjective conditions" necessary for such action, Mrs. Hartle was taught that "the struggles and activities of the Communist Party prepare the working class for this act of seizure of power," and the history of the Russian Communist Party and Revolution was taught in the school and the events and principles of this history were constantly related to contemporary conditions in the United States. Thus, for example, the class was told that the coalition of workers and peasants which had proved so successful in Russia should have its counterpart in America in a coalition of workers and Negroes, especially in the South.

Following her classes at the National Training School, Mrs. Hartle returned to Washington, where she helped to recruit and organize in "underground fashion" the employees of the Boeing Aircraft Plant in that State. At the same time, Mrs. Hartle was active in Party schools in her area. She testified that she had both been instructed and had herself taught:

> ". . . the means by which the ultimate goal might be attained was that those means would be forcible. The teaching was that any teaching, any theory of a peaceful road to socialism, or a growing over from capitalism to socialism was a betrayal of the working class and that the Communist Party leading the working class would have to arm it in the first place with the theory that the workers must know and must be prepared to know that they can only take power forcibly."

> "The action that Communist Party members should take in preparing for the ultimate goal that I was taught and that I taught, were to build the Communist Party as the vanguard party of the working class, a theoretically equipped party, equipped with the theory of Marxism-Leninism, a highly organized party that could act as a unit, as a monolithic whole, with democratic centralism, the principle guiding it, . . . and that the Communist Party should be the connection between the vanguard and the working class millions in this preparation by working with and winning the confidence of the working class and allies of the working class, such as, the Negro people, the poor farmers, other national groups, and in this way, in the course of struggle, constant struggle taking the forms of strikes

and demonstrations and picket lines and marches and various kinds of activities to train the working class and the people for revolutionary battle."

The witness Duran, who attended a Party School in Los Angeles in 1951, described what he had been taught by one Moreau, a member of the National Education Commission of the Communist Party:

> "He divided in his explanation the . . . Proletariat . . . as being divided into two groups. Those in industry that would lead the revolution, and those in agriculture that would follow, and speaking about the revolution, Professor Moreau stated to the class in a very emotional manner that he could see himself carrying a gun against the capitalist S. O. B.'s and explained to the class it was all based on the science of Marx and Lenin.
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> . . . . . .
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> "In discussing the Proletarian Revolution more thoroughly Professor Moreau explained throughout the school that the Proletarian Revolution would only come about if a Bolshevik rank and file, the sincere Communists, would get out and teach, and teach the people, the desirability of changing the system and the necessity of changing them, and in doing that, we had to teach the people that you cannot change the capitalist system to a Socialist system, to socialism successfully, the peaceful way; it had to be erupted from, and had to be taken away by force and violence, away from them and the entire state machinery of the Bourgeoisie smashed, the F. B. I., the courts and the Army and the Navy, whatever was on it, what—the entire instrumentality of the Bourgeoisie had to smashed and substituted by the Proletarian machinery. . . . and during the period of the revolution the transition, the violent transi-

tion, we had to make mass work to get the mass away from the Bourgeoisie so they would not joint [*sic*] a counterrevolution movement.

"It meant after the people of the Communist Party, the vanguard, had become satisfied, that the Bourgeoisie machinery was smashed, and they were in control, then they also had to collect guns from the people and control the people themselves.

"Q. Do I understand, Mr. Moreau [*sic*] that during this period of revolution the people, that is, the masses of the people, would be carrying guns?

"A. Yes, sir.

"Q. And after the revolution do I understand that the Party would go around and collect these guns and take them away from the people?

"A. Yes, sir; take them away from those that helped them overthrow the capitalist system in order to assure the revolution itself. . . .

"Immediately after the overthrow of the capitalist system and establishment of the dictatorship of the Proletariat, it became necessary for a Communist to establish Red Army in this country, not only to secure and maintain the dictatorship of the Proletariat, but control the people as well, and those people that did help overthrow the Government would not have any civil rights whatsoever, no voting rights, or anything; they would be dished out to them according to the way they felt, way they fell in with the Communist office by the dictatorship.

"Q. Now, Mr. Duran, what, if anything, did Mr. Moreau teach you in this school about the role that would be played by the Communist Party during this period of revolution when the Government would be overthrown by force and violence?

"A. The role of the Communist Party, and specifically within the Communist Party, the Bolsheviks

was to play a vanguard role, a leading role; that is explained scientifically in that so that first we teach the people the desirability of overthrowing them and teach them the, it could only be done through the Proletarian Revolution, and then when the time is ripe we could stampede them against the capitalist class."

Duran also testified to what he had been taught by Art Berry, District Organizer for seven States, in a Colorado school in 1952:

". . . we were discussing the scientific application of Marx and Lenin to the transition period between capitalism and socialism, and he demonstrated this with the kettle of water, that you could put a quantitative amount of water in a kettle and set it somewhere, nothing would happen, just like the masses, nothing does happen.

". . . [he] said, however, if you get that same amount, same kettle with the same amount of water in it, and put fire underneath it, then you begin to get quantitative changes, and eventually it reaches a nodule point to where it has a qualitative and abrupt transition into steam. He continued, same applied to the development of the revolution in this sense, the American people will not and cannot make a successful change over from capitalism to socialism by themselves, like the fire underneath the water, the Communist Party teaches and leads them to where when the society reaches that nodule point, the Communist people teaches the people before and then leads them to make that abrupt change into the society of socialism.

. . . . . .

"Substantially, within the same explanation of violent overthrow of the Government . . . he stated

that not only would it be that, but that we would have to set up barricades, establish a central point from where we would participate from; he stated the 'we' literally speaking 'we', would have to have a central point because during the revolution it may become necessary to ebb, retreat in certain battles, and we would have to learn to retreat in an organizational way and a correct way. It was essential to learn to ebb as it was to flow on the revolution.

"In the ebbing we were to see that we ebb before the enemy wiped everybody out. Ebbing to the central point that had been barricaded, reorganization, and then at the correct time start flowing forward in the revolution."

The witness Obadiah Jones testified concerning a Party Training School in St. Louis which he attended in 1947. Jones was taught "that the only way the national problem could be solved would be in connection with the Proletariat Revolution." Jones was also instructed as to the nature of a Communist army:

"A. He said general staff of an army was different from the Communist Party . ... general staff of an army operated from a safe spot from behind the line and led the army from a far distance, and that the Communist Party went forth and fought with the workers.

"Q. Did he say anything with reference to the techniques?

"A. Yes, he said that you couldn't be a good leader without knowing all of the techniques of fighting.

"Q. Did he say anything with respect to carrying out instructions?

"A. Yes, sir.

"Q. What did he say in that connection?

"A. He said that capitalists in the army did not

carry out the instructions in full, but the Communists did, irregardless of what the cost would be, they would carry out instructions completely."

At the final session, the students were required by the instructor to take a pledge:

> "The pledge was each of us are Communists or members of the Party and each of us have a responsibility and we must carry out our responsibility and work for the interests of the Party and its recipients and carry out the full will of the Party even though it meant to fight and to kill, we must carry out the demands of the Party and all of them."

The witnesses Clontz, Childs, and Reavis testified primarily as to their dealings with petitioner, Scales. We regard this testimony, which finds no counterpart in the *Yates* record with respect to any of the defendants whose acquittal was directed, as being of special importance in two ways: it supplies some of the strongest and most unequivocal evidence against the Party based on the statements and activities of a man whose words and deeds, by virtue of his high Party position, carry special weight in determining the character of the Party from the standpoint of the Smith Act; and it appears clearly dispositive as to the quality of petitioner's Party membership, and his knowledge and intent, when we come to consider him not as a Party official but as the defendant in this case.[23]

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[23] Petitioner complains that the evidence as to Party activities emanating from such witnesses as Lautner, Hartle, Duran, and Jones, was inadmissable because not tied up with him. This confuses the nature of the offense Congress has created, for it is important as a preliminary matter, without adverting to the particular defendant in the prosecution, to prove the character of the organization of which he is charged with being a member. The other side of petitioner's claim on this score would entail giving greater or conclusive weight to petitioner's admissions as to the nature of the Party merely because he is the

In 1948 Ralph C. Clontz, Jr., then a student at Duke Law School, undertook to furnish the F. B. I. with information he had gained about Communist Party activities in North Carolina, and to volunteer his services in attempting to penetrate the Party to acquire further information. As a result, in September of that year, Clontz sent a postcard to petitioner, informing him that he was a law student and that he was interested in communism. Petitioner replied by sending Clontz "a large cardboard box filled with Communist literature." An accompanying letter, headed "Carolina District Communist Party U. S. A." with the notation "Junius Scales, Chairman," explained:

> "Under separate cover I have already sent you a rather varied sample of our literature. I hope you will give it close attention. If I can discuss any matter relating to my Party and its program with you in person, I will be glad to do so."

Several days later Clontz went to visit petitioner and thus began a relationship which was to bring him into intimate contact with the Communist Party, its teachings, purposes and activities.

At an early meeting between the two, petitioner told Clontz that it was impossible for the Communist Party to succeed to power through educating the people in this country and gaining their votes at the polls, but that a forceful revolution would be necessary. At a later meeting, the discussion was not limited to the theoretical inevitability of revolution, but went beyond the theory itself to an explanation of "basic strategy" which the

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defendant in this case. But that would be as illogical on the preliminary question as would be excluding evidence not connected up with petitioner. The evidence as to Scales' words and deeds is weighty and strong against the Party only because of his position in the Party, not because he is the defendant here.

Communist Party was using to give concrete foundation to the theory, *i. e.*, to bringing about the revolution:

> "The defendant [petitioner] explained that basically their strategy was bottomed on a concept that there were two classes of people in this country, that could be used by the Communist Party to foment a revolution.
>
> "The first class he termed the working class or Proletariat, working class, he said, had as its natural born leaders or vanguard, the Communist Party.
>
> "The second class, he described, in this country was what he termed the Negro nation. The Negro nation he described as a separate nation in what he termed the Black Belt, including thirteen Southern States, and the strategy of the Communist Party was to bring the working class, led by the Communist Party, and what he termed the Negro nation, together, to bring about a forceful overthrow of the Government.
>
> "Now Scales and the Communist Party taught that the basic strategy of the Communist Party would never change, but that tactics might be altered as the situation changed."

On petitioner's invitation, Clontz joined the Communist Party on January 17, 1950. He was not assigned to a particular group but became a member "at large," in order to continue his instruction under petitioner. In the course of this instruction, petitioner repeatedly told Clontz of the necessity for revolution to bring about the Dictatorship of the Proletariat. Scales analogized the situation in the United States to that in Russia prior to the 1917 Revolution. He pointed out that revolution would be "easier" in this country than it had been in Russia:

> "that while in the Soviet Union there had been no one to help the Soviet Party, that in this country

> when the revolution started, we would have the benefit of the help from the mother country, Russia, in bringing about our own revolution, because part of the purposes of the Communist Party in the Soviet Union was international in scope and that we naturally would continue to receive help in all circumstances from the Soviet Party when the revolution was started here in this country."

Petitioner explained that the Soviet Union could not be expected to land troops to start a revolution here. A similar procedure had been unsuccessful in China. Rather, he said "that we Communists in this country would have to start the revolution, and we would have to continue fighting it," but that the Soviet Union would aid the Communist Party in this endeavor by furnishing it "with experienced revolutionaries from Russia."[24] He added that "if the United States declared war on the Communists in their revolution, then the Soviet Union would land troops, and he said that would be a bloody time for all." When asked

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[24] As stated by Clontz: "Scales said that we could not expect the Soviet Union to land troops to start our revolution and finish it.

"Scales further said that experience had taught the Communists that that sort of approach was disastrous, . . . that they in China, the Communists, had sent in Russian generals and the only result had been that the Chinese Communists had been licked completely, that the new approach, of the Soviet Union, was shown in the example of Mao, who was then Mao-Tse-Ting, who was then the leader in the Communist Chinese Government.

"He pointed out that Mao had never even been to Russia, but instead the Soviet Union and the Soviet Communist Party had sent over military leaders to instruct Mao, and his leaders, and had sent over professional revolutionaries that could aid them in bringing about their revolution.

"He said that we could count on drawing on the experience of the Soviet Union, and that they also would furnish us when the revolution came with experienced revolutionaries from Russia."

by Clontz when all this would occur. Scales noted that a "depression would greatly accelerate the coming of the revolution" if the Communists used it properly to prepare the masses of the people.

Petitioner arranged for Clontz to be awarded a scholarship to study in New York at the Jefferson School of Social Science, an official Communist Party School, during the month of August 1950. Because Clontz arrived at a time when few scheduled courses were being offered, the bulk of his training at the school was received in private instruction from Doxey A. Wilkerson, the teacher with whom petitioner had communicated in arranging Clontz's scholarship.[25] Wilkerson like petitioner, told

[25] At one point, in the course of instructing Clontz, Wilkerson wrote out the formula "M–L=F&V" which he told Clontz illustrated the position adopted by the appellate courts in the United States that Marxist-Leninist teaching equalled force and violence. Clontz testified:

"Doxey Wilkerson explained to me that since that formula had been established, action had had to be taken by the National Party to conceal the fact that their principles and their goal and their aims and their doctrines included forceful and violent revolution. He pointed out, for example, that an official statement had been issued by the Education Commission of the Communist Party U. S. A. disowning or disclaiming certain study outlines, certain texts, certain publications put out by the Communist Party.

"In fact, the order had ordered all Communist Party members to turn those in, and the statement, he said, after that particular date—I don't recall the exact date—had said henceforth, we will not recognize these as official Party publications.

"He said by doing that they accomplished two things. They, first of all, established a technicality for Communists on trial and their attorneys, that the Party no longer accepted Marxism-Leninism, because, he said, all Marxism-Leninism included in its teachings and in its concept the basis of a violent revolution.

"He said, secondly, that it did not unduly hamper the Communist Party, that in the future many things would be left unsaid that previously had been said, many things would be left unwritten that previously had been written, that, for example, in teaching a more

Clontz, "that the Communist Party recognized and expressed to themselves that the only kind of means would be proper means, which would be forceful means, that no longer was there any even pretense among intelligent Communists that any voting system or any people's election could bring this government." He also stated, as Scales had, that "the revolution basically would come about by combining the forces of what had been already identified as the Negro nation and the working class as the vanguard."

In line with this strategy, Wilkerson advised Clontz that he should not let his membership in the Communist Party become known, that by remaining "under cover" he "would be much more helpful to the Party when the Revolution came." As part of his undercover activity, Clontz was directed to attempt to infiltrate various organizations of the working class in order to achieve "a background of respectability," and to be able to lead such organizations "toward the goal of the Communist Party, . . . the undermining of the Government and overthrowing of the Government, bringing communism in the United States." But Clontz was not to lose contact with the Party, for if he "got isolated without Party direction . . . [his] efforts would be pretty

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bare outline, would be given, and the instructor would fill in the revolutionary part, or the students would be sent into the Marxist-Leninist works as references to find the revolution, without having it spelled out in the outline.

"He said, that, naturally, would not change the basic Party goal or the basic aims of the Communist Party, but that it would make it more difficult for Communists to be convicted.

"One thing I recall during our discussion, he had given me a pamphlet, a study outline entitled White Chauvinism, and he pointed out to me, he said, 'Now I have been instructing you from that outline, but technically it is illegal because we Communists have disclaimed it, so that you are holding an illegal document there, actually.'"

largely wasted." In connection with these instructions, Wilkerson mentioned "on of the things that frightened the United States leaders was they knew that not only did they have to contend with China and the other Communist-dominated countries, but that also in every capitalist country the working class party, the Communists, would be working from within."

When Clontz returned to North Carolina, he reported to petitioner on his activities at the Jefferson School. He also informed petitioner, under instructions from the F. B. I., that he wished to move to New York. Petitioner arranged for Clontz to remain under his direction and to pay dues to him, while in New York, rather than effecting a formal transfer. Clontz moved to New York in March of 1951. While there Scales directed him to "get in with the A. C. L. U. organization to report on what value they might have in the coming struggle . . . ." Clontz had also been advised by an associate of petitioner to "infiltrate . . . the Civilian Defense setup."

The witnesses Childs and Reavis also testified to their relationship with Scales, who among other things arranged for their attendance at Party schools where their instruction followed much the same pattern as that described by Clontz.[20] In 1952 Childs attended a "Party

[20] One of Child's early tasks, assigned him by the District Organizer, as a Communist Party member was to serve as bodyguard for a visiting official of the Civil Rights Congress. The official, accompanied by Childs and petitioner, spoke in Chapel Hill in February of 1951 on the Korean War. His theme, according to Childs, was "that the Korean War was being used by the capitalists as a means of oppressing the Negro people . . . that the capitalists are sending the Negroes to Korea to fight the Korean people who are trying to fight for their rights, the same as the Negro people are in the South." Childs took notes on the speech, and testified that the official's "exact words" were:

"In Korea they are still called niggers. Niggers are court-martialed for refusing to have their men slaughtered.' Licutenant Gilbert is one

Training School" of which petitioner was a director. The school was given "for outstanding cadres in North and South Carolina and Virginia Districts of the Communist Party." It was held on a farm and strict security measures were taken. The District Organizer of Virginia instructed at the school. He told the students that "the role of the Communist Party is to lead the working masses to the overthrow of the capitalist government." With respect to the preliminary task of gaining the "broad coalition" necessary to achieve this task, he stated that,

> ". . . the Communist Party has a program of industrial concentration in which they try to get people, that is, people who are Communist Party members, into key shops or key industries which the Party has determined or designated to be industrial concentration industries or plants. This is so that the Communist Party members in a particular plant will be able to have a cell, or a Communist Party group in which they will be able to more effectively plan for such things as attempting to control the union in that particular plant."

And, in a compulsory recreation period, this same instructor gave a demonstration of jujitsu and, explaining that the students "might be able to use this on a picket line," how to kill a person with a pencil. According to Childs' testimony "what he showed us to do was to take our pencil, . . . just take the pencil and place it simply in the palm of your hand so that the back will rest against the base of the thumb, and then we were to take it, and the person, and give a quick jab so that it would penetrate through here [demonstrating], and enter the

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example. They say that the nigger is yellow. Yellow, give the niggers in North Carolina and Georgia rifles and tell them to fight for their rights. Yellow, man, you will see fighting like you have never seen before."

heart, and then if we could not do that, we just take it and grab it at the base of the throat."

Reavis attended the Party's New York Jefferson School in 1942. In a course on "Negro History" the students, drawn primarily from the South, were taught that ". . . the Negro people was the only revolutionary group within the United States that we could align themselves [*sic*] with, and hope to reach their [*sic*] gains through the avenue of force and violence, by overthrow of the Government, by Proletariat faction . . . ." Reavis was later advised to seek employment at the Western Electric Plant in Winston Salem. He stated:

> "I bumped into Mr. Scales at Harvey's home and I—the report said . . . the advice I'd been getting was confirmed by him. I advanced the question on what I should do in case I did get employment there at Western Electric, and I knew it was a Government work, what I should do in case I was asked to sign certain papers, and I was told to do the same, that they had when signing a Taft-Hartley affidavit, to go ahead and sign them, that before they did, the defendant asked me if I had signed any papers that might be used as proof that I was in the Party, and I didn't remember any."

We conclude that this evidence sufficed to make a case for the jury on the issue of illegal Party advocacy. *Dennis* and *Yates* have definitely laid at rest any doubt but that present advocacy of *future* action for violent overthrow satisfies statutory and constitutional requirements equally with advocacy of *immediate* action to that end. 341 U. S., at 509; 354 U. S., at 321. Hence this record cannot be considered deficient because it contains no evidence of advocacy for immediate overthrow.

Since the evidence amply showed that Party leaders were continuously preaching during the indictment period

the inevitability of eventual forcible overthrow, the first and basic question is a narrow one: whether the jury could permissibly infer that such preaching, in whole or in part, "was aimed at building up a seditious group and maintaining it in readiness for action at a propitious time . . . the kind of indoctrination preparatory to action which was condemned in *Dennis*." *Yates, supra*, at 321–322. On this score, we think that the jury, under instructions which fully satisfied the requirements of *Yates*,[27] was entitled to infer from this

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[27] The trial court charged: "Moreover, the teaching in the abstract or teaching objectively, that is, teaching, discussing, explaining, or expounding what is meant by the aim or purpose of any author, group, or society of overthrowing the Government by force and violence is not criminal. For example, study and discussion by the Communist Party or by any other group in classrooms, or in study groups, or public or private meetings with the object of informing the participants or the audience of the aims and purposes of the doctrines of Marx, Lenin, Stalin, or the Communist Party is entirely lawful. Furthermore, without being criminal, the Communist Party could privately or publicly endeavor to persuade its members that they should adopt and espouse the belief that the Government of the United States should be overthrown by force and violence as speedily as circumstances will permit. This is no more than advocating an idea, and advocating an idea is no crime. Moreover, without transgressing the Smith Act, the Party might even instruct its members that it would be for their good and benefit, if this belief or idea were carried into effect.

"All of this is permissible because such utterances are protected by the First Amendment of the Federal Constitution, guaranteeing freedom of speech.

"However, if the Party went further, and with the intention of overthrowing the Government by force and violence, it taught, or advocated a rule or principle of action which both, one, called on its members to take forcible and concrete action at some advantageous time thereafter to overthrow the Government by force and violence, and, too, expressed that call in such written or oral words as would reasonably and ordinarily be calculated to incite its members to take concrete and forcible action for such overthrow; then, if the Com-

systematic preaching that where the explicitness and concreteness, of the sort described previously, seemed necessary and prudent, the doctrine of violent revolution—elsewhere more a theory of historical predictability than a rule of conduct—was put forward as a guide to future action, in whatever tone, be it emotional or calculating that the audience and occasion required; in short, that "advocacy of action" was engaged in.

The only other question on this phase of the case is whether such advocacy was sufficiently broadly based to permit its attribution to the Party. We think it was. The advocacy of action was not "sporadic" (cf. p. —, *supra*), the instances of it being neither infrequent, remote in time nor casual.[28] It cannot be said that

munist Party did that, the Party became such a society or group, as was outlawed by the Smith Act.

"To be criminal the teaching or advocacy, or the call to action just described need not be for immediate action, that is, for action today, tomorrow, next month, or next year. It is criminal, nonetheless, if the action is to be at an unnamed time in the future, to be fixed by the circumstances or on signal from the Party.

"It is criminal if it is a call upon the members to be ready, or to stand in readiness for action, or for a summons to action at a favorable, or opportune time in the future, or as speedily as circumstances will permit, provided always that the urging of such readiness be by words which would reasonably and ordinarily be calculated to spur a person to ready himself for, and to take action towards, the overthrow of the Government. But those to whom the advocacy or urging is addressed must be urged to do something now or in the future, rather than merely to believe in something. In other words the advocacy must be of concrete action, and not merely a belief in abstract doctrine. However, the immediate concrete action urged should be intended to lead towards the forcible overthrow, and be so understood by those to whom the advocacy is addressed."

[28] Although most of the particularized evidence related to events not within the limitations period, it was of course open to the jury, under proper instructions which were given, to infer that such events reflected the character of Party advocacy during the limitations period. Petitioner does not contend to the contrary.

the jury could not have found the criminal advocacy was fully authorized and condoned by the Party. We regard the testimony of the witnesses, whose credibility, of course, is not for us, as indicating a sufficiently systematic and substantial course of utterances and conduct on the part of those high in the councils of the Party, including the petitioner himself, to entitle the jury to infer that such activities reflected tenets of the Party. The testimony described activities in various States, including the teaching at some seven schools, among them the national Party school. The witnesses told of advocacy by high Party officials, including that of leaders of the Party in nine States. Further, there was testimony that the Party followed the principle of "democratic-centralism" whereby a position once adopted by the Party must be unquestionably adhered to by the whole membership. The conformity of the views expressed and the terms employed in advocating violent overthrow in such States as Washington, North Carolina, Missouri, Colorado and Virginia could reasonably be taken by the jury as a practical manifestation of "democratic-centralism." Another concrete illustration of this principle could have been found in the circumstance that in almost every instance where a speaker engaged in advocacy of violent overthrow, he not only advocated violence to his audience but urged others to go out and do likewise. All of these factors combine to justify the inference that the illegal individual advocacy as to which testimony was adduced was in truth the expression of Party policy and purpose.

The requirement of Party imputability is adequately met in the record. (See note 18, *supra*.)

The sufficiency of the evidence as to other elements of the crime requires no exposition. Scales' "active" membership in the Party is indisputable, and that issue was properly submitted to the jury under instructions that

were entirely adequate.[29] The elements of petitioner's "knowledge" and "specific intent" (*ante*, p. —) require no further discussion of the evidence beyond that already given as to Scales' utterances and activities. Compare *Noto* v. *United States*, *post*, at —. They bear little resemblance to the fragmentary and equivocal utterances and conduct which were found insufficient in *Nowak* v. *United States*, 356 U. S. 660, 666–667, and in *Maisenberg* v. *United States*, 356 U. S. 670, 673.

We hold that this prosecution does not fail for insufficiency of the proof.

## IV.

### Alleged Trial Errors.

Petitioner contends that a number of errors were committed, having the effect of vitiating the fairness of his trial. For reasons substantially similar to those given by the Court of Appeals (260 F. 2d 38–46), we find that none of petitioner's contentions raise points meriting reversal.

1. *Admission of Remote or Prejudicial Evidence.*

Petitioner complains as to the admission of certain evidence relating to the Party's general or specific purposes. In particular, he objects to the admission of evidence about the Party's program in the so-called "Black Belt" and especially to the admission of a pamphlet called "I Saw the Truth in Korea," which contained

[29] The trial court charged: "The defendant admits that he was a member of the Party. For his membership to be criminal, however, it is not sufficient that he be simply a member. It must be more than a nominal, passive, inactive, or purely technical membership. In determining whether he was an active or inactive member, consider how much of his time and efforts he devoted to the Party. To be active he must have devoted all, or a substantial part, of his time and efforts to the Party."

a very gruesome description of alleged American atrocities in Korea. There can be no doubt that this matter, and particularly the latter, would not have reflected well on the petitioner or the Party in the eyes of the jury, but if it was relevant to an element of the crime then whether its asserted prejudicial effect so far outweighed its probative value as to require exclusion of the evidence, was a decision which rested in the sound discretion of the trial judge. Particularly in light of the fact that the most damaging of this material emanated from petitioner himself (260 F. 2d, at 38), we cannot say that its admission involved an abuse of discretion which would warrant our reversal of the conclusions of the trial judge and the Court of Appeals on this score.

We therefore need only consider whether the complained-of evidence was legally relevant and therefore admissable. As we have pointed out in our review of the record, the jury could have inferred that part of the Communist Party's program for violent revolution was the winning of favor with the Negro population in the South, which it thought was particularly susceptible to revolutionary propaganda and action. Surely, then, the evidence of the Party's teaching that the Negro population should be given the right to form a separate nation is not irrelevant to the issue of whether or not the Party's program as a whole constituted a call to stand in readiness for violent action, when this particular plank in the platform was intended as bait for one of the substantial batallions in the hoped-for revolutionary array. Of course, the preaching that the Negro population in the South has the right to form a separate nation does not of itself constitute illegal advocacy. But neither does the teaching of the abstract theory of Marxism-Leninism, which we have held cannot alone form the basis for a conviction for violation of the Smith Act, *Yates* v. *United States, supra;* yet it cannot be seriously urged that

evidence of such teaching is legally irrelevant to the charge. Similarly the evidence of the pamphlet on alleged American atrocities in Korea cannot be said to be irrelevant to the issue of illegal advocacy by the Party. Once again, the pamphlet may not in itself constitute such an incitement to violence as would justify a finding that the Party advocated violent overthrow, but it is possible to infer from it that it was the purpose of the Party to undermine the Government in the eyes of the people in time of war as a preparatory measure, albeit legal in itself, to the teaching and sympathetic reception of illegal advocacy to violent revolution.

Petitioner also argues that this and other evidence was not connected up with him or his activities. Whether it was or not, since it is necessary under the membership clause to prove the advocacy of the Party as an independent element of the offense, this renders admissible evidence not connected up with the defendant in the accepted conspiracy sense. (See note 23, *supra*.) Doubtless because of this there is a special need to make sure that the evidence establishing a defendant's personal knowledge of illegal Party advocacy and his intent in becoming or remaining a Party member to accomplish violent overthrow is cogent and adequately brought home to him. But, having said that, we have said all, in respect to petitioner's claim on this point.

2. *The "Jencks" Claim.*

When this case was first before us we reversed the conviction, 355 U. S. 1, on the authority of our decision in *Jencks* v. *United States*, 353 U. S. 657. Before the second [illegible] Congress enacted the so-called Jencks statute, 18 U. S. C. § 3500. Petitioner, as we understand him, does not now argue that that statute was incorrectly applied in his case; rather he attacks, on constitutional grounds, the statute itself. That the procedure set forth in the statute

does not violate the Constitution and that the procedure required by the decision of this Court in *Jencks* was not required by the Constitution was assumed by us in *Palermo* v. *United States*, 360 U. S. 343. It is enough to say here that there can be no complaint by a criminal defendant that he has been denied the opportunity to examine statements by Government witnesses which do not relate to the subject matter of their testimony, for such statements bear no greater relevance to that testimony which he seeks to impeach than would statements by persons unconnected with the prosecution. Whether the statements so relate to prosecution testimony is a decision which is vested not in the Government but in the trial judge with full opportunity for appellate review. Once this question has been determined, whether the statements may be useful for purposes of impeachment is a decision which rests, of course, with the defendant himself.

Petitioner also objects to the limitation of the Act to written statements signed or adopted by the witness or to any form of substantially verbatim transcription of an oral statement by the witness. However, petitioner does not assert that he has been prejudiced by this provision, or that any statement or document requested by him was withheld on the authority of the statute. In these circumstances we perceive no basis for this aspect of petitioner's claims.

3. *Congressional Findings in the Communist Control Act of 1954 and the Internal Security Act of 1950.*

Petitioner asserts that the Congressional findings as to the character of the Communist Party contained in both statutes deprived him of a fair trial on the issue of the character of the Party. That legislative action may have the effect of precluding a fair trial is not impossible, see *Delaney* v. *United States*, 199 F. 2d 107, but petitioner's claim here appears to be no more than an afterthought.

There is no showing of any prejudice, nor that during the *voir dire* examination of jurors, petitioner attempted to ascertain whether any juror had even heard of these enactments, much less that petitioner attempted to have any juror disqualified on that ground. We cannot on this record regard this as a substantial contention.

Finally, for the reasons stated by the Court of Appeals, 260 F. 2d, at 44–46, we think that petitioner waived any right he might have had to question the method of choosing grand jurors by his failure to comply with Rule 12, Fed. Rules Crim. Proc., and further that no impropriety in the method of choosing grand jurors has been shown.

The judgment of the Court of Appeals must be

*Affirmed.*

# SUPREME COURT OF THE UNITED STATES

No. 1.—October Term, 1960.

Junius Irving Scales, Petitioner, v. United States of America. | On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[June 5, 1961.]

Mr. Justice Black, dissenting.

Petitioner was convicted for violation of the "membership clause" of the Smith Act which imposes a penalty of up to twenty years' imprisonment together with a fine of $20,000 upon anyone who "becomes or is a member of, or affiliates with, any . . . society, group or assembly of persons [who each, advocate, or encourage the overthrow of the existing government by force or violence], knowing the purposes thereof . . . ."[1] Rejecting numerous contentions urged for reversal, the Court upholds a six-year sentence imposed upon petitioner under the authority of its prior decisions in *Dennis* v. *United States*[2] and *Yates* v. *United States*.[3] My reasons for dissenting from this decision are primarily those set out by Mr. Justice Brennan—that § 4 (f) of the Subversive Activities Control Act[4] bars prosecutions under the membership clause of the Smith Act—and Mr. Justice Douglas—that the First Amendment absolutely forbids Congress to outlaw membership in a political party or similar association merely because one of the philosophical tenets of that group is that the existing government should be overthrown by force at some distant time in the future when

[1] 18 U. S. C. § 2385.
[2] 341 U. S. 494.
[3] 354 U. S. 298.
[4] 50 U. S. C. § 783 (f).

circumstances may permit. There are, however, two additional points that I think should also be mentioned.

In an attempt to bring the issue of the constitutionality of the membership clause of the Smith Act within the authority of the *Dennis* and *Yates* cases, the Court has practically rewritten the statute under which petitioner stands convicted by treating the requirements of "activity" and "specific intent" as implicit in words that plainly do not include them. Petitioner's conviction is upheld just as though the membership clause had always contained these requirements. It seems clear to me that neither petitioner nor anyone else could ever have guessed that this law would be held to mean what this Court now holds it does mean. For that reason, it appears that petitioner has been convicted under a law that is, at best, unconstitutionally vague and, at worst, *ex post facto*.[5] He has therefore been deprived of his right to be tried under a clearly defined, pre-existing "law of the land" as guaranteed by the Due Process Clause and I think his conviction should be reversed on that ground.[6]

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[5] The fact that the Court's rewriting of the statute has, in this case, narrowed the statute rather than broadened it does not change this conclusion. Petitioner has a right to have the constitutionality of the statute considered on the basis upon which it was originally written, for that was the condition of the statute when he violated it. The danger of the practice in which the Court is engaging is pointed up by its decision in the companion case, *Communist Party* v. *Subversive Activities Control Board*, *ante*, p. —, in which it imposes the burden upon the members of that Party to guess as to what sections of the Subversive Activities Control Act will be held unconstitutional. The difficulty of that burden is tremendously increased by the decision in this case for they cannot know how many and what kind of additional requirements will be found to be "implied" and placed into the "balance" by which the constitutionality of questionable provisions of that Act will be determined.

[6] *Cohen* v. *Hurley*, — U. S. —, — (dissenting opinion). See also *Konigsberg* v. *State Bar of California*, — U. S. —, — (dissenting opinion).

Secondly, I think it is important to point out the manner in which this case re-emphasizes the freedom-destroying nature of the "balancing test" presently in use by the Court to justify its refusal to apply specific constitutional protections of the Bill of Rights. In some of the recent cases in which it has "balanced" away the protections of the First Amendment, the Court has suggested that it was justified in the application of this "test" because no direct abridgment of First Amendment freedoms was involved, the abridgment in each of these cases being, in the Court's opinion, nothing more than "an incident of the informed exercise of a valid governmental function."[1] A possible implication of that suggestion was that if the Court were confronted with what it would call a direct abridgment of speech, it would not apply the "balancing test" but would enforce the protections of the First Amendment according to its own terms. This case causes me to doubt that such an implication is justified. Petitioner is being sent to jail for the express reason that he has associated with people who have entertained unlawful ideas and said unlawful things, and that of course is a *direct* abridgment of his freedoms of speech and assembly—under any definition that has ever been used for that term. Nevertheless, even as to this admittedly direct abridgment, the Court relies upon its prior decisions to the effect that the Government has power to abridge speech and assembly if its interest in doing so is sufficient

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[1] *Konigsberg* v. *State Bar of California*, — U. S. —, —. See also *Uphaus* v. *Wyman*, 360 U. S. 72, *Barenblatt* v. *United States*, 360 U. S. 109; *Uphaus* v. *Wyman*, 364 U. S. 388; *Wilkinson* v. *United States*, 365 U. S. 399; *Braden* v. *United States*, 365 U. S. 431; *In re Anastaplo*, — U. S. —. In each of these cases, I disagreed, as I still do, with the majority's characterization of the abridgment involved as "incidental," as I understand that term to have significance in First Amendment cases. See particularly my dissenting opinion in the *Konigsberg* case, *supra*, at —.

to outweigh the interest in protecting these First Amendment freedoms.[8]

This, I think, demonstrates the unlimited breadth and danger of the "balancing test" as it is currently being applied by a majority of this Court. Under that "test," the question in every case in which a First Amendment right is asserted is not whether there has been an abridgment of that right, not whether the abridgment of that right was intentional on the part of the Government, and not whether there is any other way in which the Government could accomplish a lawful aim without an invasion of the constitutionally guaranteed rights of the people. It is, rather, simply whether the Government has an interest in abridging the right involved and, if so, whether that interest is of sufficient importance, in the opinion of a majority of this Court, to justify the Government's action in doing so. This doctrine, to say the very least, is capable of being used to justify almost any action Government may wish to take to suppress First Amendment freedoms.

[8] The decisions in both of the cases upon which the Court here relies were rested on the "balancing test." See *Dennis* v. *United States, supra*, at 506–511; *Yates* v. *United States, supra*, at 321.

# SUPREME COURT OF THE UNITED STATES

No. 1.—October Term, 1960.

Junius Irving Scales, Petitioner, v. United States of America. | On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[June 5, 1961.]

Mr. Justice Douglas, dissenting.

When we allow petitioner to be sentenced to prison for six years for being a "member" of the Communist Party, we make a sharp break with traditional concepts of First Amendment rights and make serious Mark Twain's light-hearted comment that "It is by the goodness of God that in our country we have those three unspeakably precious things: freedom of speech, freedom of conscience, and the prudence never to practice either of them." [1]

Even the Alien and Sedition Laws—shameful reminders of an early chapter in intolerance—never went so far as we go today. They were aimed at conspiracy and advocacy of insurrection and at the publication of "false, scandalous, and malicious" writing against the Government, 1 Stat. 596. The Government then sought control over the press "in order to strike at one of the chief sources of disaffection and sedition" Miller, Crisis in Freedom (1951), p. 56. There is here no charge of conspiracy, no charge of any overt act to overthrow the Government by force and violence, no charge of any other criminal act. The charge is being a "member" of the Communist Party, "well-knowing" that it advocated the overthrow of the Government by force and violence, "said defendant intending to bring about such overthrow by force and violence as speedily as circumstances would permit." That falls far short of a

[1] Following the Equator (1903), Vol. I, p. 198.

charge of conspiracy. Conspiracy rests not in intention alone but in an agreement with one or more others to promote an unlawful project. *United States* v. *Falcone*, 311 U. S. 205, 210; *Direct Sales Co.* v. *United States*, 319 U. S. 703, 713. No charge of any kind or sort of agreement hitherto embraced in the concept of a conspiracy is made here.

We legalize today guilt by association, sending a man to prison when he committed no unlawful act. Today's break with tradition is a serious one. It borrows from the totalitarian philosophy. As stated by O'Brian, National Security and Individual Freedom (1955), pp. 27–28:

> "The Smith Act of 1940 *made it unlawful* for any person to be or to become a member of or affiliate with any society, group, or assembly which teaches, advocates, or encourages the overthrow or destruction of any government in the United States by force or violence. These statutes [the Smith Act together with a 1920 amendment to the Immigration Law, Act of June 5, 1920, 41 Stat. 1008] therefore, imported into our law the alien doctrine of guilt by association, which up to this time had been regarded as abhorrent and which had never been recognized either by the courts or by the Department of Justice, even during the perils and excitements of the First World War."

The case is not saved by showing that petitioner was an active member. None of the activity constitutes a crime. The record contains evidence that Scales was the Chairman of the North and South Carolina Districts of the Communist Party. He recruited new members into the Party, and promoted the advanced education of selected young Party members in the theory of communism to be undertaken at secret schools. He was a director of one such school. He explained the principles

of the Party to an FBI agent who posed as someone interested in joining the Party, and furnished him literature, including articles which criticized in vivid language the American "aggression" in Korea and described American "atrocities" committed on Korean citizens. He once remarked that the Party was setting up underground means of communication, and in 1951 he himself "went underground." At the school of which Scales was director, students were told (by someone else) that one of the Party's weaknesses was in failing to place people in key industrial positions. One witness told of a meeting arranged by Scales at which the staff of the school urged him to remain in his position in an industrial plant rather than return to college. In Scales' presence, students at the school were once shown how to kill a person with a pencil, a device which, it was said, might come in handy on a picket line. Other evidence showed Scales to have made several statements or distributed literature containing implicating passages. Among them were comments to the effect that the Party line was that the Negroes in the South and the working classes should be used to foment a violent revolution; that a Communist government could not be voted into power in this country because the Government controlled communication media, newspapers, the military, and the educational systems, and that force was the only way to achieve the revolution; that if a depression were to come the Communist America would be closer at hand than predicted by William Z. Foster; that the revolution would come within a generation; that it would be easier in the United States than in Russia to effectuate the revolution because of assistance and advice from Russian Communists. Petitioner at different times said or distributed literature which said that the goals of communism could only be achieved by violent revolution that would have to start internally with the working classes.

Not one single illegal act is charged to petitioner. That is why the essence of the crime covered by the indictment is merely belief [2]—belief in the proletarian revolution, belief in Communist creed.

Spinoza summed up in a sentence much of the history of the struggle of man to think and speak what he believes:

"Laws which decree what every one must believe, and forbid utterance against this or that opinion, have too often been enacted to confirm or enlarge the power of those who dared not suffer free inquiry to be made, and have by a perversion of authority turned the superstitution of the mob into violence against opponents." *Tractatus Theologico-Politicus* (London 1862) p. 349.

"The thought of man shall not be tried, for the devil himself knoweth not the thought of man," said Chief Justice Brian in Y. B. Pasch, 17 Edw. IV, f. 2, pl. 2. The crime of belief—presently prosecuted—is a carryback to the old law of treason where men were punished for compassing the death of the King. That law which had been employed for "suppression of political opposition or the expression of ideas or beliefs distasteful to those in power," Hurst, Historic Background of the Treason Clause, 6 Fed. B. J. 305, 307, was rejected here, and the treason clause of our Constitution was "most praised for the reason that it prevented the use of treason,

[2] The prototype of the present prosecution is found in Communist lands. The Communist Government in Czechoslovakia on October 6, 1948, promulgated a law, § 3 of which provided:

"(1) Whoever publicly or before several people instigates against the Republic, against its independence, constitutional unity, territorial integrity or its people's democratic system [of government], its social or economic order, or against its national character as guaranteed by the Constitution, shall be punished for a minor crime by rigorous confinement for from three months to three years.

"(2) The following shall be punished in like manner: Whoever intentionally or through gross negligence makes the dissemination of the instigative statement specified in Subsection 1 possible or easy."

trials as an instrument of political faction." *Id.*, 307. Sedition or treason in the realm of politics and heresy in the ecclesiastical field had long centered on *beliefs* as the abhorrent criminal act. The struggle on this side of the Atlantic was to get rid of that concept and to punish men not for what they thought but for overt acts against the peace of the Nation. *Cramer* v. *United States*, 325 U. S. 1, 28–30. Montesquieu, who was a force in the thinking of those times (*id.*, 15, n. 21), proclaimed against punishing thoughts or words:

> "There was a law passed in England under Henry VIII, by which whoever predicted the king's death was declared guilty of high treason. This law was extremely vague; the terror of despotic power is so great that it recoils upon those who exercise it. In the king's last illness, the physicians would not venture to say he was in danger; and surely they acted very right. . . . Marsyas dreamed that he had cut Dionysius's throat. Dionysius put him to death, pretending that he would never have dreamed of such a thing by night if he had not thought of it by day. This was a most tyrannical action: for though it had been the subject of his thoughts, yet he had made no attempt towards it. The laws do not take upon them to punish any other than overt acts." The Spirit of Laws (1949), pp. 192–193.
>
> "Words do not constitute an overt act; they remain only in idea." *Id.*, 193.

These were the notions that led to the restrictive definition of treason, presently contained in Art. III, § 3, of the Constitution, which requires overt acts. *Cramer* v. *United States*, *supra*; *Haupt* v. *United States*, 330 U. S. 631, 645 (concurring opinion); Hurst, Treason in the United States, 58 Harv. L. Rev. 395. Our long and painful experience with the law of treason, wholly apart from the First Amendment, should be enough warning that we as a free

people should not venture again into the field of prosecuting beliefs.

That was the philosophy behind *Board of Education* v. *Barnette*, 319 U. S. 624, 641–642:

> "We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
>
> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

Nothing but beliefs are on trial in this case. They are unpopular and to most of us revolting. But they are nonetheless ideas or dogma or faith within the broad framework of the First Amendment. See *Barenblatt* v. *United States*, 360 U. S. 100, 145–152 (dissent). The creed truer to our faith was stated by the Bar Committee headed by Charles E. Hughes which in 1920 protested the refusal of New York Assembly to seat five members of the Socialist Party: [3]

> ". . . it is of the essence of the institutions of liberty that it be recognized that guilt is personal and cannot be attributed to the holding of opinion or to mere intent in the absence of overt acts. . . ."

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[3] N. Y. L. Doc., 143d Sess., 1920, Vol. 5, No. 30, p. 4.

Belief in the principle of revolution is deep in our traditions. The Declaration of Independence [4] proclaims it:

> "whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."

This right of revolution has been and is a part of the fabric of our institutions.[5] Last century when Russia invaded Hungary and subdued her, Louis Kossuth came here to enlist American support. On January 8, 1852, Lincoln spoke in sympathy of the Hungarian cause and was a member of a committee which on January 9, 1852, submitted Resolutions in Behalf of Hungarian Freedom. Among these resolutions was one that read:

> "That it is the right of any people, sufficiently numerous for natural independence, to throw off, to revolutionize, their existing form of government, and

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[4] "When honest men are impelled to withdraw their allegiance to the established law or custom of the community, still more when they are persuaded that such law or custom is too iniquitous to be longer tolerated, they seek for some principle more generally valid, some 'law' of higher authority, than the established law or custom of the community. To this higher law or more generally valid principle they then appeal in justification of actions which the community condemns as immoral or criminal. They formulate the law or principle in such a way that it is, or seems to them to be, rationally defensible. To them it is 'true' because it brings their actions into harmony with a rightly ordered universe, and enables them to think of themselves as having chosen the nobler part, as having withdrawn from a corrupt world in order to serve God or Humanity or a force that makes for the highest good." Becker, The Declaration of Independence (1942) pp. 277–278.

[5] See the Appendix to this opinion.

to establish such other in its stead as they may choose." Basler, Vol. II, The Collected Works of Abraham Lincoln (1953), p. 115.

On January 12, 1848, Lincoln in an address before the United States House of Representatives stated: "Any people anywhere, being inclined and having the power, have the *right* to rise up, and shake off the existing government, and form a new one that suits them better. This is a most valuable,—a most sacred right—a right, which we hope and believe, is to liberate the world." *Id.*, Vol. I, p. 438.

Of course, government can move against those who take up arms against it. Of course, the constituted authority has the right of self-preservation. But we deal in this prosecution of Scales only with the legality of ideas and beliefs, not with overt acts. The Court speaks of the prevention of "dangerous behavior" by punishing those "who work to bring about that behavior." That formula returns man to the dark days when government determined what behavior was "dangerous" and then policed the dissidents for tell-tale signs of advocacy. What is "dangerous behavior" that must be suppressed in its talk-stage has had a vivid history even on this continent. The British colonial philosophy was summed up by Sir William Berkeley who served from 1641 to 1677 as Virginia's Governor: ". . . I thank God, there are no free schools nor printing, and I hope we shall not have these hundred years; for learning has brought disobedience and heresy, and sects into the world, and printing has divulged them, and libels against the best government. God keep us from both!" 2 Henning's Stat. Va. 1660–1682, p. 517. The history is familiar; much of it is reviewed in Chafee, The Blessings of Liberty (1956). He states in one para-

graph what I think is the Jeffersonian conception of the First Amendment rights involved in the present case:

> "We must choose between freedom and fear—we cannot have both. If the citizens of the United States persist in being afraid, the real rulers of this country will be fanatics fired with a zeal to save grown men from objectionable ideas by putting them under the care of official nursemaids." *Id.*, 156.

In recent years we have been departing, I think, from the theory of government expressed in the First Amendment. We have too often been "balancing" the right of speech and association against other values in society to see if we, the judges, feel that a particular need is more important than those guaranteed by the Bill of Rights. *Dennis* v. *United States*, 341 U. S. 494, 508–509; *Communications Assn.* v. *Douds*, 339 U. S. 382, 399–400; *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 463–466; *Uphaus* v. *Wyman*, 360 U. S. 72, 78–79; *Barenblatt* v. *United States*, 360 U. S. 109, 126–134; *Bates* v. *Little Rock*, 361 U. S. 516, 524; *Shelton* v. *Tucker*, 364 U. S. 479; *Wilkinson* v. *United States*, 365 U. S. 399; *Braden* v. *United States*, 365 U. S. 431; *Konigsberg* v. *State Bar*, 366 U. S. —; *In re Anastaplo*, 366 U. S. —. This approach, which treats the commands of the First Amendment as "no more than admonitions of moderation" (see Hand, The Spirit of Liberty (2d ed. 1954), p. 278), runs counter to our prior decisions. See *Lovell* v. *Griffin*, 303 U. S. 444, 450; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 108; *Board of Education* v. *Barnette*, 319 U. S. 624, 639.

It also runs counter to Madison's views of the First Amendment as we are advised by his eminent biographer, Irving Brant:

> "When Madison wrote, 'Congress shall make no law' infringing these rights, he did not expect the Supreme

Court to decide, on balance, whether Congress could or could not make a law infringing them. It was true, he observed in presenting his proposals, that state legislative bodies had violated many of the most valuable articles in bills of rights. But that furnished no basis for judging the effectiveness of the proposed amendments:

"'If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.'

"This statement by Madison, along with all the rest of his speech, is so devastating to the 'balance theory' that efforts have been and are being made to discredit its authenticity. The *Annals of Congress*, it is said, is not an official document, but a compilation of stenographic reports (by a shorthand reporter admitted to the floor for that purpose) published in the press and containing numerous errors. That is true, although the chief complaint was that partially caught sentences were meaningless. In general, that which was clearly reported was truly reported. In the case of this all-important speech, Madison spoke from notes, and the notes in his handwriting are in the Library of Congress. They parallel the speech from end to end, scantily, but leaving no doubt of the fundamental faithfulness of the report." The Madison Heritage, 35 N. Y. U. L. Rev. 882, 899–900.

Brant goes on to relate how Madison opposed a resolution of censure against societies creating the political turmoil that was behind the Whiskey Rebellion. *Id.*, p. 900. He expressed in the House the view that opinions are not objects of legislation. "If we advert to the nature

of Republican Government, we shall find that the censorial power is the people over the Government, and not in the Government over the people." *Id.*, p. 900.

The trend of history, as Jefferson noted, has been against the rights of man. He wrote that "The natural progress of things is for liberty to yield and government to gain ground."[6] The formula he prepared for a society where ideas flourished was not punishment of the unorthodox but education and enlightenment of the masses. Jefferson wrote to Madison on December 20, 1787:[7]

> "I own, I am not a friend to a very energetic government. It is always oppressive. It places the governors indeed more at their ease, at the expense of the people. The late rebellion in Massachusetts has given more alarm, than I think it should have done. Calculate that one rebellion in thirteen States in the course of eleven years, is but one for each State in a century and a half. No country should be so long without one. Nor will any degree of power in the hands of government, prevent insurrections. In England, where the hand of power is heavier than with us, there are seldom half a dozen years without an insurrection. In France, where it is still heavier, but less despotic, as Montesquieu supposes, than in some other countries, and where there are always two or three hundred thousand men ready to crush insurrections, there have been three in the course of the three years I have been here, in every one of which greater numbers were engaged than in Massachusetts, and a great deal more blood was spilt. In Turkey, where the sole nod of the despot is death, insurrections are the events of every day. Compare again the ferocious depredations of their insurgents,

[7] The Writings of Thomas Jefferson (Memorial ed. 1903) p. 37.
[6] The Writings of Thomas Jefferson (Memorial ed. 1903) pp. 391, 392.

> with the order, the moderation and the almost self-extinguishment of ours. And say, finally, whether peace is best preserved by giving energy to the government, or information to the people. This last is the most certain, and the most legitimate engine of government. Educate and inform the whole mass of the people. Enable them to see that it is their interest to preserve peace and order, and they will preserve them. And it requires no very high degree of education to convince them of this. They are the only sure reliance for the preservation of our liberty."

This is the only philosophy consistent with the First Amendment. When belief in an idea is punished as it is today, we sacrifice those ideals and substitute an alien, totalitarian philosophy in their stead.[*]

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[*] Gellhorn, American Rights (1960) in commenting on *Dennis* v. *United States*, 341 U. S. 494 and *Yates* v. *United States*, 354 U. S. 298 states:

"The aftermath of the *Yates* case is interesting. By the end of 1956 convictions of Communist leaders under the Smith Act had numbered 114. Many of these cases were still pending in the appellate courts when the *Yates* decision was announced in June of 1957. On one ground or another, convictions were set aside and new trials were granted to many of these defendants. The Department of Justice itself dropped the prosecution of a considerable number, on the ground that they could not properly be convicted on the basis of the evidence now available. Most significantly of all, the cases against the nine remaining defendants in *Yates*, as to whom the Supreme Court had refused to dismiss the charges, were abandoned by the prosecution because there was insufficient evidence that they had advocated action as distinct from opinion. After all the clamor, after all the expressed alarm about the peril into which the United States was being plunged by this handful of misguided fanatics, the prosecution felt itself unable to show persuasively that the Communist spokesmen had engaged in the forbidden incitements to illegality.

"This should stimulate a sober second look at the surface attractions of programs of suppression and coercion. Occasionally the supporters of these programs are scoundrels who falsely parade them-

"The most indifferent arguments," Bismarck said, "are good when one has a majority of bayonets." That is also true when one has the votes.

What we lose by majority vote today may be reclaimed at a future time when the fear of advocacy, dissent, and non-conformity no longer cast a shadow over us.

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selves as upholders of democracy; but more often they are good and sincere men. Men genuinely devoted to worthy ends sometimes endorse efforts to force unanimity of sentiment, not because they consciously espouse authoritarianism, but because they hope thus to assure maximum support for the nation and its people. No matter how well intentioned they may be, however, those efforts themselves create a graver danger than they overcome. The perils sought to be suppressed are regularly overestimated. History shows in one example after another how excessive have been the fears of earlier generations, who shuddered at menaces that, with the benefit of hindsight, we now know were mere shadows. This in itself should induce the modern generation to view with prudent skepticism the recurrent alarms about the fatal potentialities of dissent. In any event, in a world torn between the merits of freedom and the blandishments of totalitarian power, the lovers of freedom cannot afford to sacrifice their moral superiority by adopting totalitarian methods in order to create a self-deluding sense of security. Suppression, once accepted as a way of life, is likely to spread. It reinforces the herd urge toward orthodoxies of all kinds—religious, economic, and moral as well as political." Pp. 82, 83.

## APPENDIX.

The constitutions of 15 States have, at one time or another, made specific provision for the right of revolution by reserving to the people the right to "alter, reform or abolish" the existing frame of government. See Pennsylvania Const. of 1873, Art. I, § 2; Maryland Const. of 1867, Dec. of Rights, Art. I; Virginia Const. of 1902, Art. I; § 3; Alabama Const. of 1865, Art. I, § 2; Arkansas Const. of 1874, Art. II, § 1; Idaho Const. of 1889, Art. I § 2; Kansas Const. of 1858, Art. I, § 2; Kentucky Const. of 1890, Bill of Rights, § 4; Ohio Const. of 1851, Art. I, § 2; Oregon Const. of 1857, Art. I, § 1; Tennessee Const. of 1870, Art. I, § 1; Texas Const. of 1876, Art. I, § 2; Vermont Const. of 1793, c. 1, Art. VII; West Virginia Const. of 1872, Art. 3, § 3; Wyoming Const. of 1889, Art. I, § 1. Some 24 other States have, or have had, slightly varying forms of the same provision. See New Hampshire Const., Pt. I, Art. 10; Massachusetts Const., Part the First, Article VII; Connecticut Const., Article First, § 2; New Jersey Const., Art. I, ¶ 2; Delaware Const., Preamble; North Carolina Const., Art. I, § 3; South Carolina Const., Art. 1, § 1; Rhode Island Const., Art. I, § 1; California Const., Art. I, § 2; Colorado Const., Art. II, § 2; Florida Const., Dec. of Rights, § 2; Indiana Const., Art. I, § 1; Iowa Const., Art. I, § 2; Maine Const., Art. I, § 2; Michigan Const. of 1835, Art. I, § 2; Minnesota Const., Art. I, § 1; Mississippi Const., Art. III, § 6; Missouri Const., Art. I, § 3; Montana Const., Art. III, § 2; Nevada Const., Art. I, § 2; North Dakota Const., Art. I, § 2; Oklahoma Const., Art. II, § 1; South Dakota Const., Art. VI, § 26; Utah Const., Art. I, § 2. The older constitutions often add a clause which shows the roots of these provisions in the right of revolution. "The doctrine of non-resistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind," the New Hampshire Const., Pt. I, Art. 10, recites. The same language may be found in Mary-

land Const., Dec. of Rights, Art. VI; Tennessee Const., Art. I, § 2.

These provisions have been considered by several state courts. It has been held that the general right of the people to alter or abolish the government does not deprive state courts from passing on the validity of constitutional amendments peacefully passed. *Wells* v. *Bain*, 75 Pa. St. 39, 46–49; *Koehler & Lange* v. *Hill*, 60 Iowa 543, 614–617; *Bennett* v. *Jackson*, 186 Ind. 533, 538–541; *Erwin* v. *Nolan*, 280 Mo. 401, 406–407. More recently, several state courts have had occasion to consider these provisions in connection with the persecution of Communists. See *Commonwealth* v. *Widovich*, 295 Pa. St. 311, 317–318 (State Sedition Act); *Nelson* v. *Wyman*, 99 N. H. 33, 50–51 (legislative investigation); *Braverman* v. *Bar Assn. of Balto.*, 209 Md. 328, 346–347 (disbarment of a lawyer convicted under the Smith Act). The latter two of these decisions relied on language in the decision of this Court in *Dennis* v. *United States*, 341 U. S. 494, 501: "Whatever theoretical merit there may be to the argument that there is a 'right' to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change."

Yet the right of revolution has always meant more than this. "The words . . . ," said the court in *Wells* v. *Bain*, *supra*, 47, "embrace but three known recognised modes by which the whole people, the state, can give their consent to an alteration of an existing lawful frame of government, viz.: 1. The mode provided in the existing constitution. 2. A law, as the instrumental process of raising the body for revision and conveying to it the powers of the people. 3. A revolution.

"The first two are peaceful means through which the consent of the people to alteration is obtained, and by which the existing government consents to be displaced

without revolution. The government gives its consent, either by pursuing the mode provided in the constitution, or by passing a law to call a convention. If consent be not so given by the existing government, the remedy of the people is in the third mode—revolution."

This does not mean the helplessness of the established government in the face of armed resistance, for that government has the duty of maintaining existing institutions. *Wells* v. *Bain*, *supra*, 49. But it does mean that the right of revolution is ultimately reserved to the people themselves, whatever formal, but useless remedies the existing government may offer. This is shown in the history of our own revolution. Legislatures and governments have the right to protect themselves. They may judge as to the appropriate means of meeting force directed against them, but as to the propriety of the exercise of the ultimate right of revolution, there, as John Locke says, "the people shall be judge." Second Treatise on Civil Government, § 240. To forbid the teaching of the propriety of revolution, even where the teacher believes his own lesson, is to hinder the people in the free exercise of this great sovereign right. See *Dennis* v. *United States*, 341 U. S. 494, 581–586 (dissenting opinion).

Lincoln's full statement, made in 1848 and already referred to, reads:

> "Any people anywhere, being inclined and having the power, have the *right* to rise up, and shake off the existing government, and form a new one that suits them better. This is a most valuable,—a most sacred right—a right, which we hope and believe, is to liberate the world. Nor is this right confined to cases in which the whole people of an existing government, may choose to exercise it. Any portion of such people that *can*, *may* revolutionize, and make their *own*, of so much of the territory as they inhabit. More than this, a *majority* of any portion of such

people may revolutionize, putting down a *minority*, intermingled with, or near about them, who may oppose their movement. Such minority, was precisely the case, of the tories of our own revolution. It is quality of revolutions not to go by *old* lines, or *old* laws; but to break up both, and make new ones." I Basler, The Collected Works of Abraham Lincoln (1953), pp. 438–439.

# SUPREME COURT OF THE UNITED STATES

No. 1.—October Term, 1960.

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| Junius Irving Scales, Petitioner, v. United States of America. | On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit. |

[June 5, 1961.]

Mr. Justice Brennan with whom The Chief Justice and Mr. Justice Douglas join, dissenting.

I think that in § 4 (f) of the Internal Security Act Congress legislated immunity from prosecution under the membership clause of the Smith Act. The first sentence of § 4 (f) is: "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute." The immunity granted by that sentence is not in my view restricted, as the Court holds, to *mere* membership, that is to membership which is nominal, passive or theoretical. The immunity also extends to "active and purposive membership, purposive that is as to the organization's criminal ends," which is the character of membership to which the Court today restricts the application of the membership clause of the Smith Act.

In its approach to the relation of the first sentence of § 4 (f) to the membership clause of the Smith Act, I think the Court asks the wrong question. The question is not whether the Congress meant in § 4 (f) to "repeal" the membership clause of the Smith Act. The "repeal" of a statute connotes its erasure from the statute books. The grant of immunity from prosecution under a criminal statute merely suspends prosecution under the statute so long as the immunity is not withdrawn. For example, when we recently decided in *Reina* v. *United States*,

— U. S. —, that the Narcotic Control Act of 1956 legislated immunity from prosecution under state, as well as federal, narcotics laws, our decision did not remotely suggest that the immunity effected the "repeal" of either the state or the federal criminal statutes.

The Congress was faced with a dilemma in legislating the policy of compulsory registration of Communists into the Internal Security Act. This statute represented, in the words of the late John W. Davis, a policy of "ventilation rather than prohibition." Communists were to be forced to expose themselves to public view in order that the menace they present might be dealt with more effectively. The registration provisions of the Act are the very vitals of that measure. But compulsory disclosure of membership would compel admission of a crime, or provide a link to proof of a crime. Communists then could invoke their constitutional right to silence and the registration provisions would be wrecked on the rock of the Self-Incrimination Clause of the Fifth Amendment. It is no disparagement of the Congress to say that their deliberations reflect great uncertainty how to resolve the dilemma. Congress wrote the Internal Security Act knowing that the privilege against self-incrimination was a solid barrier against compulsory self-incrimination by congressional fiat. The legislative history of § 4 (f) is murky but I think there clearly emerges a congressional decision to extend immunity from prosecution for any membership in a Communist organization in order to safeguard against constitutional frustration the policy of disclosure embodied in the registration provisions.[1]

[1] Senator McCarran, the floor manager of the bill in the Senate, spoke of the exposure of Commu is as one of the "principal objectives" of the bill. 96 Cong. Rec. 14174.

The other principal objective was the definition of certain conduct as criminal, it being the sense of Congress that existing provisions to

The purpose of the first sentence of § 4 (f) seems clear in the setting of the Act. In § 2 Congress describes the Communist Party as a group bent on overthrowing the Government by force and violence, such as is described in the Smith Act, and establishing a totalitarian dictatorship in the United States. Section 4 (a) makes it a crime to conspire to that end. Sections 7 and 8 provide for com-

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preserve the security of the Nation were inadequate (H. R. Rep. No. 2980, 81st Cong., 2d Sess., p. 2; S. Rep. No. 1358, 81st Cong., 2d Sess., p. 7; 96 Cong. Rec. 14174–14175) and not effective to combat the threat of subversion from within. The criminal provisions of the Internal Security Act are broad and comprehensive. Section 4 (a) prohibits conspiracy to perform any act which would substantially contribute to the establishment of a totalitarian dictatorship under the direction and control of a foreign power. Section 4 (b) makes it unlawful for a government employee without authorization to communicate classified information to anyone whom he believes to be a representative of a foreign government or member of a Communist organization, and § 4 (c) prohibits the receipt of such information. Section 10 prohibits a Communist organization from using the mails or broadcasting on any radio or television station without designating, by printing on the envelope or announcement as the case may be, that it is "a Communist organization." A member of a Communist organization which is registered or ordered to register by the Subversive Activities Control Board, who has knowledge or notice of such registration or order, cannot fail to disclose his membership when he is seeking or accepting employment by the United States or at any defense facility. It is also unlawful for such a person to hold employment under the United States, or in any defense facility if he is a member of a Communist-action organization. § 5 (a). Such a person cannot apply for or use a passport. § 6 (a). The Act also modified several existing statutes dealing with subversives and espionage in order to expand their coverage. These extensive criminal provisions belie the thought that Congress regarded the Smith Act as the main gun in the arsenal of antisubversive weapons. The many allusions to the fact that Communists were being more covert in their activities so as to avoid coming within the provisions of the Smith Act make it clear that that Act was not to be of major importance in the campaign against domestic Communists.

pulsory registration of Communist organizations and members. Penalties for not registering are imposed. If members were required to register under the 1950 Act and if membership were a crime under the 1940 Act, then self-incrimination in violation of the Fifth Amendment might be required by the registration requirements of the 1950 Act. Plainly it was with that problem that Congress dealt in § 4 (f).

The bills introduced in the Eighty-first Congress [2] provided for compulsory registration of members of the Communist Party, but afforded no immunity for registering. When the House Committee reported out its bill,[3] a provision was included which forbade receipt in evidence of the fact of registration under the Internal Security Act. When the bill reached the floor, Congressman Celler pointed out that the immunity provision was constitutionally insufficient. In the first place, that bill only provided that the fact of registration under the Act should not be received in evidence against the registrant in prosecutions under the Act. Congressman Celler pointed out that there were other criminal statutes, including the Smith Act, for which no immunity was granted.[4] He secondly pointed out that the immunity to be constitutionally protective must be complete; and he discussed *Counselman* v. *Hitchcock*, 142 U. S. 547, in support of that thesis.[5] During these debates and in response to the challenge made by Congressman Celler, the manager of the bill, Congressman Wood, offered an amendment extending the same protection against prosecutions "for any alleged violation of any other criminal statute."[6] It was

[2] S. 2311, 81st Cong., 2d Sess.; H. R. 9490, 81st Cong., 2d Sess.

[3] H. R. 9490, 81st Cong., 2d Sess.; see H. R. Rep. No. 2980, 81st Cong., 2d Sess., p. 8.

[4] 96 Cong. Rec. 13739.

[5] *Id.*, 13740.

[6] *Id.*, 13761.

adopted without discussion and the bill passed the House.

At that juncture it seems obvious that restricting the immunity to use of the fact of registration in any criminal prosecutions did not satisfy the constitutional requirements. Such a limited immunity was granted by statute in *Counselman* v. *Hitchcock*, *supra*. Yet as the Court stated in that case, p. 564:

> "This, of course, protected him against the use of his testimony against him or his property in any prosecution against him or his property, in any criminal proceeding, in a court of the United States. But it had only that effect. It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted."

Meanwhile the Senate bill[7] was reported out. The late John W. Davis had stated in a letter to the Senate Committee[8] that compulsory registration might make a member "involuntarily incriminate himself." The Senate bill accordingly provided that neither holding office nor membership in the Communist Party should constitute a violation of certain provisions of the bill; and it also provided that the fact of registration should not be received in evidence against the registrant in prosecutions under those provisions. Senator Kilgore in a minority report[9] made the same point that Congressman Celler

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[7] S. 4037, 81st Cong., 2d Sess.

[8] S. Rep. No. 1358, 81st Cong., 1st Sess., pp. 43–44.

[9] S. Rep. No. 2369, Pt. 2, 81st Cong., 2d Sess., pp. 12–13.

had made in the House—that this immunity provision did not even purport to avoid self-incrimination in relation to the membership clause of the Smith Act and did not provide that complete immunity which *Counselman* v. *Hitchcock, supra*, held essential.

Senator Lehman spoke to the same effect when the bill reached the floor: [10]

> "'In support of the statement made by the Senator from Illinois that the real Communists would simply fail to register, and could not be forced to register, and would be outside the control of the law-enforcement officials, is it not a fact that there would be every reason why a real Communist should not register—because if he did register, would not he make himself liable to incrimination under the Smith Act?'
>
> "Mr. DOUGLAS. 'Certainly.'
>
> "Mr. LEHMAN. 'So he would be virtually pleading guilty of a penal offense; would he not?'
>
> "Mr. DOUGLAS. 'Yes; the real leaders would be.'"

Senator Lehman stated on another day of the debate: [11]

> "What dyed-in-the-wool Communist will run to the nearest registration office to list himself as such and expose himself to the penalties contained in the Mundt-Ferguson bill? Obviously, if he did, he would lose all his effectiveness as a Communist, besides subjecting himself to the penalties set forth in this bill. He would also expose himself to the penalties set forth in other laws, such as the Smith Act, under which the 11 top Communist leaders were recently convicted. In fact, registration would constitute self-incrimination, if not under the terms of this law, then under the terms of the Smith Act. Obviously, the Communists would not register."

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[10] 96 Cong. Rec. 14421.

[11] *Id.*, 14190.

Senator Humphrey voiced the same objection: [12]

> ". . . his registration would be equivalent to testimony; and under the interpretation of very prominent attorneys,[13] it could be that he could be prosecuted under the Smith Act."

The answers to these objections were wide of the mark. Senator McCarran said that the registrant was immunized [14] from prosecutions under § 4 of the bill.[14] The relevancy of the Smith Act was not recognized. Senator Ferguson and Senator Mundt likewise did not meet the point. They noted [15] that membership was held irrelevant to the Smith Act in the prosecution of *Dennis* v. *United States*, *supra*, overlooking the fact that that case

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[12] *Id.*, 14500.

[13] This reference apparently was to Charles Evans Hughes, Jr. and John W. Davis. *Id.*, 14500. The statement of Mr. Davis is referred to in note 8, *supra*. That of Mr. Hughes can be found in Hearings on H. R. 5852, Senate Committee on the Judiciary, 80th Cong., 2d Sess. 415–420.

[14] "In the opinion of the chairman of the Committee on the Judiciary, this provision leans over backward to protect Communists against self-incrimination; but it is one of the many safeguards written into the bill by the Judiciary Committee to assure the complete constitutionality of the measure." *Id.*, 14175. See also *id.*, 14443.

[15] "Mr. LONG. I was under the impression, from hearing the Senator from New York [Sen. Lehman] yesterday, that he said that under a previous statute it was unlawful to belong to an organization that advocated the overthrow of the United States Government by force . . . .

"Mr. FERGUSON. Is it not true that Judge Medina, in his charge to the jury in the trial of the 11 Communists, told them that mere membership in the Communist Party was not sufficient to warrant the jury in convicting them under the Smith Act?

"Mr. MUNDT. Precisely.

"Mr. FERGUSON. So that it could not apply to that law.

"Mr. MUNDT. It could not conceivably apply. Even if the impression which the junior Senator from Louisiana had were correct, it would still be an incorrect interpretation of the act." *Id.*, 14235.

involved not membership but a conspiracy to practice the Communist dogma.

But no change in the bill was made in this respect before it passed the Senate. The important changes in § 4 (f)—the ones that are critical here—took place in Conferences.[16] No contemporary statement of the intended sweep of the revised § 4 (f) is in the legislative record. But I have set out enough history to indicate that the motivation was clearly the fear that the immunity granted under the earlier versions of the bill was not constitutionally sufficient to compel registration, since it did not extend to prosecutions under the membership clause of the Smith Act.

When the bill came back from the Conference Committee Congressman Multer referred to § 4 (f) in its new form and predicted it would "vitiate one of the most important parts of the Smith law." [17] No reply was made to his comments. And only brief reference was made to § 4 (f) in the Senate. Senator Kefauver said,[18] "There is nothing in the bill which provides that when a person registers that fact shall not be used in evidence against him in connection with the Smith Act." [19] But that statement is irrelevant to our problem because the Senator apparently did not realize that the bill had been amended in Conference to include the words "or any other criminal statute." Senator Kilgore stated that the Conference bill differed from the one approved by the Judiciary Committee over his dissent, since it nullified the Smith Act.[20] No one challenged the statement.

From this legislative history it seems tolerably clear that one purpose of § 4 (f) was to protect registrants from

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[16] H. R. Rep. No. 3112, 81st Cong., 2d Sess., p. 49.
[17] 96 Cong. Rec. 15289.
[18] *Id.*, 15198.
[19] *Ibid.*
[20] *Id.*, 15192.

prosecution under the membership clause of the Smith Act.

The Court holds, however, that the first sentence of § 4 (f) is simply "a mandate to the courts charged with the construction of subsections (a) and (c) 'or . . . any other criminal statute' that neither those two named criminal provisions nor any other shall be *construed* so as to make 'membership . . . per se a violation.'" If the phraseology were that immunity is extended only to "*membership per se*," there might be support for the argument that the immunity granted by § 4 (f) extends only to nominal membership, excluding the type of active membership which we have here. But the statute does not say "membership *per se*." It provides that "neither the holding of office nor membership in any Communist organization shall constitute *per se* a violation of subsection (a) or subsection (c) of this section or of any other criminal statute." The kind of membership given immunity is not restricted. It may be nominal, short-term, long-term, dues-paying, non-dues-paying, inactive, or active membership. Every type of membership is included. What the Congress is saying is that no type of membership shall violate alone or by itself (that is to say, *per se*) any criminal statute. When Congress said that membership "shall not constitute *per se*" a violation of any criminal statute, it meant that additional conduct besides membership, whatever its nature, is necessary to constitute a violation. Only by transposing *per se* in § 4 (f) and making it modify "membership" can the Court's argument be made plausible. That entails a substantial revision of the Act and a drastic dilution of rights of immunity which have been granted by it.

If the Court is correct in its view, the constitutionality of registration provisions of the 1950 Act are called into question. True, today's decision in *Communist Party of America* v. *Subversive Activities Control Board*, *ante*,

p. —, puts off to another day the constitutionality of the registration provisions in their conflict with the Fifth Amendment; I have noted my dissent as to the provision of the registration requirements that designated officials of the Party must complete, sign, and file the Party's registration statement. But if "active membership" remains as a crime under the Smith Act, there would be a serious question whether any Communist—active or nominal—could constitutionally be compelled to register under the 1950 Act. For it could be urged that the act of registering would supply one link that might complete the chain of evidence against him under the Smith Act. It is no answer to that contention that mere membership would not support a conviction. As we said in *Blau* v. *United States*, 340 U. S. 159, 161:

> "Whether such admissions by themselves would support a conviction under a criminal statute is immaterial. Answers to the questions asked by the grand jury would have furnished a link in the chain of evidence needed in a prosecution of petitioner for violation of (or conspiracy to violate) the Smith Act. Prior decisions of this Court have clearly established that under such circumstances, the Constitution gives a witness the privilege of remaining silent. The attempt by the courts below to compel petitioner to testify runs counter to the Fifth Amendment as it has been interpreted from the beginning."

This principle had been an established one ever since *Counselman* v. *Hitchcock*, *supra*, was decided.

The registration provisions of the 1950 Act were the very heart of that law. Disclosure of who the Communists were was the provision from which all other controls stemmed. As the Senate Report stated,[21] the registration requirement is the "central provision" of the Act, the pur-

[21] S. Rep. No. 2369, 81st Cong., 2d Sess., p. 4.

pose being "(a) to expose the Communist movement and protect the public against innocent and unwitting collaboration with it; (b) to expose, and protect the public against, certain acts which are declared unlawful."

A fair and literal reading of § 4 (f) can save the 1950 Act against this Fifth Amendment objection. By reading § 4 (f) to provide that being a member of the Communist Party shall not "constitute *per se*" a crime, immunity from prosecution under the membership clause of the Smith Act is effected. And that is in full harmony with the purpose to make something more than "membership" necessary for conviction. That something more can be some kind of unlawful activity. After the 1950 Act was passed, membership without other activity was no longer sufficient for Smith Act prosecutions. That seems to me to be the only fair way to read § 4 (f). That conclusion necessarily results in a dismissal of this indictment.